Supreme Court, U.S.
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90 - No. 475

IN THE

Supreme Court of the United States

1990 TERM

WILLIAM KUNTZ, III,

Petitioner,

against

MANLEY, BURKE and FISCHER, L.P.A., Special Counsel to the Trustee, PETER J. WALSH, Esq., of One Westminister Co., Inc., a Delaware Corporation, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

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Dated: March 18, 1991

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1991
(4820—LC3-72)

Questions Presented

1. Whether counsel appointed under 11 U.S.C. 327 are entitled to compensation for preparation of fee applications?

2. Whether the Court of Appeals failed to consider the application of the Nucorp holding?

3. Whether the District Court failed to consider the objections of petition in light of the weight of the evidence in the Bankruptcy Court and the economy to the estate?

4. Whether the Bankruptcy Court abused its descretion in awarding a fee far in excess of the time and benefit demonstrated in the record?

Jurisdiction of the Case

This is an appeal from a fee award under 11 U.S.C. 327 and 330. This appeal is taken under 28 United States Code and under Rule 10 of the Rules of the Supreme Court of the United States and in the exercise of the court's power of supervision over the Bankruptcy Act and in resolution of dis-harmonious positions of the Courts of Appeals of the various circuits.

Parties to the Case

William Kuntz, III Petitioner, Manley, Burke and Fischer, L.P.A., and Mssrs. Manley and Fischer.*

*Peter J. Walsh, Esq., as former trustee of one Westminister Co., Inc.; the United States Trustee and the United States Attorney, who disclaim any interest; the City of Dayton, Ohio, who apparently takes no present position, and the Debtor, One Westminister Co., Inc.

Table of Contents.

Page

Statement of the Case 1

Argument 7

Table of Contents to Appendix.

Appendix A—Judgment Order of United States Court of Appeals for the Third Circuit 1a

Appendix B—Memorandum Opinion of the United States District Court for Delaware 1b

Appendix C—Order of the United States District Court for Delaware Affirming Fee Award 1c

Appendix D—Order of the United States Bankruptcy Court 1d

Appendix E—Brief of Appellant, William Kuntz, III 1e

Appendix F—Entry and Order of Distribution 1f

Appendix G—Decision and Entry Amending the Order of Distribution 1g

Appendix H—Brief of Appellee, Manley, Burke & Fischer 1h

Appendix I—Extract From a Transcript Before the United States Bankruptcy Court 1i

Appendix J—Objections and/or Observations to the Application for Fees, Expenses and Other Compensations of Special Counsel to the Trustee and Debtor—Manley, Burke & Fischer 1j

Page

Appendix K—Order of United States Bankruptcy Court, July 18, 1983 ..... 1k

Appendix L—Order of U. S. District Court for the District of Delaware, Dated May 14, 1985 ... 1l

Appendix M—Order of U. S. District Court for the District of Delaware, Dated May 23, 1990 ... 1m

TABLE OF AUTHORITIES.

CASES CITED:

Grant v. George Schumann Tire & Battery, 908 F.2d 874 (11th Cir. 1990)..... 7

In re Emergency Beacon Corp., 71 Bankr. 117, 119 (S.D.N.Y. 1987) 7

In re First Colonial Corp. of America, 544 F.2d 1291, 1298 (5th Cir.), cert. denied *sub nom.*, Baddock v. American Benefit Life Ins. Co., 431 U.S. 904 (1977) 7

In re Levine, 32 Bankr. 742, 743 (S.D.N.Y.), *aff'd without opinion*, 732 F.2d 141 (2d Cir. 1984) 7

In re Nucorp Energy, Inc., 764 F.2d 655, 657 (9th Cir. 1985)..... 7

In re: One Westminister Co., Inc., Case 83-14, HSB Ch. 11, District of Delaware 1

In re U.S. Golf Corp., 639 F.2d 1197, 1201 (5th Cir. 1981)..... 7

Page

In re: W. T. Grant Company, Bankrupt, U.S.C.A. 2nd, Case 90-5077, 79, 80, 81 7

Johnson vs. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974) 7

William Kuntz, III, vs. City of Dayton, Ohio, 88 U.S. 739 5

William Kuntz, III, vs. City of Dayton, OH, Case 90-1393 4

William Kuntz, III, vs. Society Bank, N.A., Case 90-1023 4

STATUTES:

Bankruptcy Act, Ch. 11 ..... 1, 2

Rule 10 of the Rules of the Supreme Court of the United States ii

11 U.S.C. 327 ..... i, ii, 4

11 U.S.C. 330 ..... ii, 12

11 U.S.C. 362 2

11 U.S.C. 363 4

28 U.S.C. ii

Page

OTHER AUTHORITIES:

Prentice-Hall Law & Business Review, Clifton, NJ, Attorney Fee Awards Reporter, Bankruptcy Fee Award Section, Vol. 12, No. 4, August 1989:

Pages 21-28 15

Page 30 17

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PETITION FOR A WRIT OF CERTIORARI

Statement of the Case.

Petitioner is a creditor and 100% shareholder of the debtor, One Westminister Co., Inc., a Delaware Corporation, which is in Ch. 11 of the Bankruptcy Act, *In Re: One Westminister Co., Inc.*, Case 83-14, HSB Ch. 11, District of Delaware. Petitioner and the debtor enjoyed a 1/2 undivided

interest in common in a property in Dayton, Ohio at 44 W Third Street commonly known as the Alladin Cleaners. Petitioner came by his interest by inheritance, having succeeded to a remainder interest from the life estate of his fraternal grandmother, Hazel Meyer Kuntz, due to the death of his father, William Kuntz, Jr., who was killed while in the United States Air Force during the Korean conflict. In 1975, upon the death of Hazel Meyer Kuntz, the trustee of the Kuntz estate conveyed the 1/2 common interest to petitioner and also conveyed the other 1/2 common interest to petitioner's aunt, Mary Ann Dillon nee Kuntz, a resident of the State of California.

In 1978 upon the request of petitioner's aunt and petitioners grandfather, the 1/2 interest in common was sold by petitioner's aunt to the corporation owned by petitioner. In 1980 the First National Bank of Dayton, Ohio seeking to enforce a cognovit judgement obtained against petitioner filed a action to foreclosure it's lien. Due to a muddled understanding of the property rights of petitioner and One Westminister Co., Inc., the Honorable William McMillan, a Judge of the Common Pleas Court of Montgomery County, Ohio ordered the entire property sold; notwithstanding the fact that One Westminister Co., Inc., was not indebted to First National Bank of Dayton, Ohio. As a result of said decision: a sheriff's sale was set for Jan. 21, 1983. Representing the First National Bank of Dayton, Ohio was the firm of Skilken, Cox, Ginger and Leonard. Mr. Leonard at that time was Mayor of Dayton, Ohio. On Jan. 19, 1983 petitioner as officer and shareholder of One Westminister Co., Inc., caused a petition under Ch. 11 of the Bankruptcy Act to be filed in Delaware seeking protection of the United States Bankruptcy Court from the improper foreclosure. The bank as well as other parties were notified of the filing as well as the automatic stay. 11 U.S.C. 362.

The First National Bank conducted further proceeding before the State Court and obtained a ruling that the company in bankruptcy was not the company that had ownership of the 1/2 interest in common and a sheriff's sale was set for mid June, 1983. At that sale a unnamed and unknown real estate partnership which was not registered with the office of the Secretary of State of Ohio bid $45,000 for the entire property. Petitioner had sought and was denied a stay in the Common Pleas Court and the Court of Appeals for Montgomery County, Ohio.

Upon learning of the subversion of the automatic stay, the United States Trustee for the District of New Jersey and Delaware moved to cite First National Bank of Dayton, Ohio for contempt and to appoint a trustee. Petitioner consented to the appointment of a trustee. Upon a hearing before the Honorable Judge Helen S. Balick, United States Bankruptcy Judge for the District of Delaware, First National Bank of Dayton was found to be in contempt (Appendix I). Subsequently in a successful appeal before the Court of Appeals for Montgomery County, Ohio the order of foreclosure was overturned as having been defective in that the debtor, One Westminister Co., Inc., was never served with a copy of the bank's complaint for foreclosure, a not insignificant omission by the First National Bank.

In the mid-1980's, the City of Dayton, Ohio announced the commencement of a project commonly known as Arcade Square 2 to redevelop part of a downtown block of Dayton, Ohio in conjunction with a community block grant from the United States Department of Housing and Urban Development. Petitioner and debtor's property were in the middle of the western part of the block were the proposed 30 story high rise and parking garage were to be located.

On October 2, 1985 upon the motion of the United States Attorney for the District of Delaware, appearing on behalf of the Commissioner of Internal Revenue, the bankruptcy case was dismissed. Petitioner prosecuted an appeal to the United States District Court for the District of Delaware and on May 14, 1986 which by the merest of coincidences was the date the City of Dayton, Ohio passed it's emergency ordinance to acquire the Alladin property. The United States of America conceded defeat in the appeal and the bankruptcy case was reinstated by order of the Honorable Murry M. Schwartz, United States District Judge for the District of Delaware (Appendix J).

In August, 1986 the City of Dayton, Ohio by and thru it's local counsel in Delaware moved to have the automatic stay lifted in order that the City of Dayton, Ohio might acquire the property under the eminent domain proceeding. No offer to purchase the property had been made to the trustee under 11 U.S.C. 363 H1, 2 and 3. The Bankruptcy Court granted the motion and the City of Dayton, Ohio filed an action in the Common Pleas Court of Montgomery County, Ohio to acquire the property by eminent domain.

At that time, the trustee of the debtor, Peter J. Walsh, Esq. obtained the engagement of the Cincinnati law firm of Manley, Burke and Fischer, LPA to conduct a defense under 11 U.S.C. 327. Trustee's counsel was also to represent petitioner under an agreement which, as the court is aware, is now in dispute.

William Kuntz, III vs. Society Bank, N.A. Case No. 90-1023;
William Kuntz, III vs. City of Dayton, Ohio Case No. 90-1393.

Upon completion of the trial court phase of the proceeding, the City of Dayton, Ohio was required to deposit the jury award ($235,000) + a cash bond ($100,000) for compensation and costs with the clerk of the Common Pleas Court.

The Manley firm prosecuted an appeal on the issue of the right of the City of Dayton, Ohio to use eminent domain in the Court of Appeals of Montgomery County, Ohio and by a motion in the Supreme Court of Ohio and by petition for certiorari in this court. *William Kuntz, III vs. City of Dayton, Ohio,* 88 U.S. 739.

Prior to the denial of the petition by this court, the law director of the City of Dayton, Ohio removed the $100,000 cash bond plus acrued interest from the account held with the clerk of courts without the authorization and approval of the Bankruptcy Court.

Petitioner took and takes the position that as the litigation was initiated by the City of Dayton, Ohio in Federal Court in Delaware and that the best pre-litigation offer the City of Dayton, Ohio made to petitioner was $67,000, that the litigation resulted in such a posture that petitioner and the debtor are the prevailing parties and accordingly are entitled to the award of attorney's fees from the City of Dayton, Ohio, when those fees were to be known.

The respondents partitioned the fund of money into three portion and delivered one portion to the trustee, Peter J. Walsh, Esq.

On May 8, 1989 upon notice and motion the fee application of Manley, Burke and Fischer, LPA was heard by the Honorable Judge Balick, United States Bankruptcy Judge for the District of Delaware. In an order Appendix D, the Court awarded the reduced amount of $47,689.47.

Petitioner took an appeal to the District Court and the fee applicants were paid the sum of $47,689.47 (Appendix I) by the trustee as petitioner, then appellant, made no motion nor objection to the court, nor moved for a stay with regards to distribution.

Pending the appeal before the Honorable Jane Roth, United States District Judge, District of Delaware, Peter J. Walsh, Esq. As trustee and counsel made an application for withdrawal and application for fees and compensation on notice and motion which was heard July 5, 1989 before the Honorable Helen S. Balick, United States Bankruptcy Judge for the District of Delaware. Mr. Walsh was awarded some $7,500 in fees and authorized reimbursement of some $2,300. Petitioner filed a appeal and said appeal, which in part treats the wayward conduct of special counsel for the trustee has by the agreement of the parties been stayed pending the outcome of this appeal and other matters pending in Delaware by order of Honorable Joseph J. Longobardi, United States District Judge, District of Delaware (Appendix K).

Upon review by the District Court, on the question of the Manley, Burke and Fischer, LPA fee award, Judge Roth affirmed the award and gave an extensive treatment of the applicable law of compensation of attorney's billing for the preparation of fee application (Appendix B). The petitioner took an appeal to the United States Court of Appeals (Appendix A) for the Third Circuit and in a short decision the court declined the appeal, footnoting the contention of petitioner in the award of the preparation of the fee application. From tha decision, petitioner brings this petition.

ARGUMENT

An award of a bankruptcy fee may be overturned only upon the showing of an abuse of discretion.

> *Grant v. George Schumann Tire & Battery,* 908 F. 2d 874 (11th Cir. 1990); *In re Nucorp Energy, Inc.,* 764 F.2d 655, 657 (9th Cir. 1985); *In re U.S. Golf Corp.,* 639 F.2d 1197, 1201 (5th Cir. 1981); *In re First Colonial Corp. of America,* 544 F.2d 1291, 1298 (5th Cir.), *cert. denied sub nom., Baddock v. American Benefit Life Ins. Co.,* 431 U.S. 904 (1977); *In re Emergency Beacon Corp.,* 71 Bankr. 117, 119 (S.D.N.Y. 1987); *In re Levine,* 32 Bankr. 742, 743 (S.D.N.Y.), *aff'd without opinion,* 732 F.2d 141 (2d Cir. 1984).
>
> *In re: W.T. Grant Company, Bankrupt,* USCA 2nd Case 90-5077, 79, 80, 81, Appellee's Brief page 3.

Further the Bankruptcy Court must apply the test enunciated in *Johnson vs. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir 1974), setting forth the 12 factors.

a. the time and labor required;

b. the novelty and difficulty of the questions presented by the case;

c. the skill requisite to perform the legal service properly;

d. the preclusion of other employment by the attorney due to acceptance of the case;

e. the customary fee for similar work in the community;

f. whether the fee is fixed or contingent;

g. time pressures imposed by the client or the circumstances;

h. the amount involved and the results obtained as a result of the attorneys' services;

i. the experience, reputation, and ability of the attorneys;

j. the "undesirability" of the case;

k. the nature and length of the professional relationship with the client; and

l. awards in similar cases.

The traditional considerations of fee awards were "Economy to the Estate."

> "[4] *Accord* in *In re Neibart Associates Press, Inc.*, 58 Bankr. 212 (Bankr. E.D.N.Y. 1985), where the requested compensation would result in a distribution to creditors of slightly less than 25 cents on the dollar, the court stated that
>
> > the allowance of all the fees requested would require in excess of 50 percent of the debtor's estate, leaving less than that percentage for distribution to general creditors. Thus, the size of the estate weighs against the relatively large amounts requested by [the trustee's attorney]

> for the performance of what, for the most part, were relatively routine tasks involving neither difficulty nor complexity.

58 Bankr. at 215. *See also In re Nicfur-Cruz Realty Corp.*, 50 Bankr. 162 (Bankr. S.D.N.Y. 1985) (fees disallowed as disproportionate to size of estate); *In re Sapolin Paints, Inc.*, 38 Bankr. 807 (Bankr. E.D.N.Y. 1984); *In re Goodman*, 40 F. Supp. 337 (W.D.N.Y. 1936) (40 percent ratio of fees requested to value of the estate is unacceptable); *In re Union Cartage Company*, 56 Bankr. 174 (Bankr. N.D. Ohio 1986) (size of estate insufficient to allow lodestar premiums; attorney fees allowed were already in excess of 47 percent of the estate's assets."

Over time this consideration changed.

"COMMENTARY

Compensation and
Reimbursement under the
Bankruptcy Code:
Inconsistencies Prevail

> *'One of the most unpleasant judicial duties which bankruptcy judges are called to perform involves reviewing fee applications submitted by professionals.'*
>
> *In re Prairie Central Railway Co., 87 Bankr. 952, 954 (Bankr. N.D.Ill. 1988)*

Title 11 of the United States Code, §§ 101 *et seq.* (the 'Bankruptcy Code' or 'Code'), represents a substantial revision of the prior bankruptcy law as it

relates to compensation of professionals. Nonetheless and despite the extensive legislative history and underlying policy of the Code there is a pervasive inconsistency in the approach adopted by the courts in considering allowances of compensation and reimbursement of expenses in bankruptcy cases.

Economy of the Estate

Under the former Bankruptcy Act, the so-called 'spirit of economy' pervaded the area of allowances of compensation and reimbursements of expenses. Over time, the expression of this concept included generalizations concerning public service, conservation of the estate's assets and the interests of the creditor recovery as the most significant factors governing the allowance of professional compensation and reimbursement of expenses. Professionals were, in effect, required to contribute to the bankrupt's overall liquidation or rehabilitation by accepting a public service discount on the value of their services in order to benefit creditors.

Constraints upon professional compensation and reimbursement resulted in cases such as *Massachusetts Mutual Life Insurance Co. v. Brock*, 405 F.2d 429, 432 (5th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969), which held that an inherent 'public interest' exists in bankruptcy cases and 'must be considered in awarding fees' to professionals. Other cases set arbitrary limits on the allowable amount of attorneys' compensation. *See In re Beverly Crest Convalescent Hospital, Inc.*, 548 F.2d 817 (9th Cir. 1976, as amended 1977) (compensation compared to and, in effect, limited to amount of district judge's salary).

The Congressional policy underlying the compensation of professionals in bankruptcy cases under the Code reflects a significant shift away from the notion of the 'economy of the estate' applicable under the former Bankruptcy Act. One objective under the Code was to induce competent attorneys and other professionals to participate in bankruptcy cases. Thus, the Code was intended not to discourage professionals from rendering services in bankruptcy cases because the level of compensation received was inferior to that provided in comparable non-bankruptcy cases requiring a similar level of services.

In the enactment of reforms under the Code, Congress clearly intended to overrule compensation policies governing Act cases. In discussing the effect of *Beverly Crest,* the House Report states that

> [i]f that case were allowed to stand, attorneys that could earn much higher incomes in other fields would leave the bankruptcy arena. Bankruptcy specialists, who enable the system to operate smoothly, efficiently, and expeditiously would be driven elsewhere, and the bankruptcy field would be occupied by only those who could not find other work and those who practice bankruptcy law only occasionally as a public service . . . *Bankruptcy specialists, however, if required to accept fees in all of their cases that are consistently lower than fees they could receive elsewhere, will not remain in the bankruptcy field.*

House Report No. 959, 95th Cong. 1st Sess. 329-30, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5787, 6286 (emphasis supplied). Moreover, the legislative history to the Code expressly over-

ruled cases such as *Brock* and also rejected a statement relating to compensation set forth in the initial Senate Report accompanying S. 2266, to the effect that the proposed reform under that Bill was not intended to change the law existing under the Act. Referring to the version of the Code finally adopted, Senator DeConcini explicitly stated that 'notions of economy of the estate in fixing fees are outdated and have no place in [the] bankruptcy code.' 124 Cong. Rec. H 11,091 (Sept. 28, 1977); S 17,408 (Oct. 6, 1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 6436, 6442.

Calculating Reasonable Compensation under the Code

Section 330(a) of the Code, requires that professionals receive '(1) reasonable compensation for actual, necessary services' and '(2) reimbursement of actual, necessary expenses.' Notably, reasonable compensation requires consideration of 'the cost of comparable services other than in a case under this title.' Accordingly, the calculation of reasonable compensation under the Code requires consideration of standards of compensation used for similar services under applicable non-bankruptcy law.

Several factors have been enumerated as relevant to and indicative of what constitutes 'reasonable compensation.' These derive from a non-bankruptcy case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) (a Title VII action), and have been generally adopted in the context of allowing reasonable compensation under section 330 of the Code. *In re Lawler*, 807 F.2d 1207 (5th Cir.

1987); *In re First Colonial Corp. of America*, 544 F.2d 1291 (5th Cir. 1977).

* * *

Courts which deny compensation for time spent in the preparation of fee applications do so on the theory that such activities do not constitute a service to the debtor's estate, but rather benefit only the particular applicant. *In re Four Star Terminals, Inc.*, 42 Bankr. 419, 436 (Bankr. D. Alaska 1984) ('matters regarding the computation of an attorney fee is not a "service rendered" on behalf of a debtor');[10] *see also In re Hotel Associates*, 28 Bankr. 332, 334 (Bankr. E.D. Pa. 1983) (attorney protects personal interest in preparation of fee application and does not provide any benefit to the estate). Moreover, some courts hold that expenses related to the preparation of fee applications constitute an non-reimbursable cost of doing business.[11]

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[10]*Four Star Terminals* was implicitly overruled when the United States Court of Appeals for the Ninth Circuit adopted the rule that allows for compensation of professionals for preparation of fee applications. *In re NuCorp Energy Corp., Inc.*, 764 F.2d 655 (9th Cir. 1985).

[11]*See In re Absoc, Inc.*, 23 Bankr. 250 (Bankr. E.D. Pa. 1982); *In re Horn & Hardart Baking Co.*, 30 Bankr. 938 (Bankr. E.D. Pa. 1983); *In re Trombley*, 31 Bankr. 386 (Bankr. D. Vt. 1983); *In re Wilson Foods Corp.*, 36 Bankr. 317, 323 (Bankr. W.D. Okla. 1984); *In re American Metals Corp.* 49 Bankr. 579 (Bankr. D. Kan. 1985); *In re Erie Lackawanna Railway Co.*, No. 72-2838 (N.D. Ohio Sept. 15, 1983); *In re The White Motors Credit Corp.*, 50 Bankr. 885 (Bankr. N.D. Ohio 1985). For a recent bankruptcy court decision examining the compensation of attorneys for time spent preparing bills in comparable non-bankruptcy cases, *see In re The Vogue*, 92 Bankr. 717 (Bankr. E.D. Mich. 1988) (where the district court follows *NuCorp Energy*, permitting compensation, thereby effectively overruling *The Vogue*).

In contrast, other courts, notably the United States Court of Appeals for each of the Fifth and Ninth Circuits, have determined that such expenses are compensable because of the attorney's statutory obligation under the Bankruptcy Code to submit a detailed accounting of all services performed for the estate. *In re NuCorp Energy Corp., Inc.*, 764 F.2d 655, (CCH) Bankr. L. Rep. ¶70, 609 (9th Cir. 1985); *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (5th Cir. 1980) (*per curiam*).[12]

The Ninth Circuit stated that time spent in preparing and presenting fee applications represents actual and necessary services due to the attorney's statutory obligation to submit to the bankruptcy court a detailed accounting of all services performed for the estate.[13] *See* 11 U.S.C. § 329(a); Bankruptcy Rule 2016(a). The court emphasized that the submission of meticulously accurate time records is a necessary prerequisite to the recovery of attorney's fees under the Bankruptcy Code and Rules. Moreover, the records aid the courts in fulfilling their

[12]*Accord In re Braswell Motor FreightLines, Inc.*, 630 F.2d 348, 351 (5th Cir. 1980) (attorneys entitled to reasonable compensation for preparation of fee application); *In re Chicago Lutheran Hospital Ass'n*, 89 Bankr. 719, 736 (Bankr. N.D. Ill. 1988); *In re Bible Deliverance Evangelistic Church*, 39 Bankr. 768, 774 (Bankr. E.D. Pa. 1984); *In re Rego Crescent Corp.*, 37 Bankr. 1000, 1008 (Bankr. E.D. N.Y. 1984); *In re United Rockwool, Inc.*, 32 Bankr. 558, 561-62 (Bankr. E.D. Va. 1983); *In re G.A.C. Corp.*, 14 Bankr. 252, 255 (Bankr. S.D. Fla. 1981); *In re Warrior Drilling & Engineering Co.*, 9 Bankr. 841, 848-49 (Bankr. N.D. Ala.) *modified on other grounds*, 18 Bankr. 684 (N.D. Ala. 1981).

[13]The court observed that in statutory fee cases, federal courts have uniformly held that time spent in establishing the entitlement to and calculating the amount of the fee is compensable. *See Southeast Legal Defense Group v. Adams*, 657 F.2d 118 (9th Cir. 1981).

obligation to ensure that claimed expenses of professional persons are justified.[14]"

Prentice-Hall Law & Business Review, Clifton, NJ, Attorney Fee Awards Reporter, Bankruptcy Fee Award Section, Vol. 12, No. 4, August 1989, pp. 21-28

In approving a fee award of $47,000 the court awarded both time spent by the fee applicants which resulted in a benefit to the estate $12,000, time spent in appeals which resulted in no benefit to the estate, time spent in speaking with petitioner's creditor, First National Bank of Dayton, Ohio which percipitated the bankruptcy in 1983 and time

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[14]The Ninth Circuit reasoned as follows:

> [I]t is both inconsistent with the express policy of the Bankruptcy Reform Act and *fundamentally inequitable to impose substantial requirements on bankruptcy counsel as prerequisites to their obtaining compensation while simultaneously denying compensation for the efforts necessary to comply with those requirements.* The preparation and presentation of the detailed fee applications required by the bankruptcy court necessarily involve substantial investments of time and effort from both counsel and staffs. To require counsel to devote considerable time to the preparation of fee applications, but to demand that they absorb the substantial cost associated therewith, would be to ignore the direct mandate of section 330(a) that reasonable compensation be provided for all 'actual, necessary' services rendered by bankruptcy counsel. Our view is consistent with the recently expressed by the Fifth Circuit: 'We have long required an attorney to file a detailed account of the legal services he provided the bankrupt in order to recover any compensation at all for his services. It would be unduly penurious to require such an accounting without granting reasonable compensation.'

(CCH) Bankr. L. Rep. at 87, 280, quoting *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (5th Cir. 1980) (*per curiam*) (emphasis in original) (citations omitted).

spent consulting internally about the fee award. As the Court of Appeals correctly observed, "based upon the testimony of the fee applicant, the bookkeeper of the firm prepared the monthly statement. The fee application is nothing more than a compendium of the original statement together with the appointment of special counsel and its attendant 'business circular' together with a modest affidavit in support, all bound thickly together."*

Accordingly, petitioner would submit that the courts below abused descretion in awarding a fee far in excess of the work demonstrated which created a benefit to the debtor's estate.

Respondents will undoubtedly argue that without their able assistance that the award of $235,000 would not have been secured. While this is an attractive argument for the fee applicants to make, the facts indicate that it was the real estate that generated the value and only 10% of the total billings were expended in that area of benefit.

Undoubtedly respondents will further assert that, as they have in William Kuntz vs. City of Dayton, Ohio Case 90-1393 now pending that they have a contract with petitioner. It may be interesting for the court to note that to date, respondents have never produced a copy of said contract bearing petitioner's signature and that even if respondents were to produce such a contract with petitioner's signature it would be a unlawful contract.

> "Court Invalidates Contract Provisions for Debtor's Attorney
>
> In *In re Senior G & A Operating Co., Inc.*, 97 Bankr. 307 (Bankr. W.D. La. 1989), the attorney for

*Appendix A, p. 2a, footnote 1.

> the chapter 11 debtor obtained an employment contract that provided for (i) a billing rate of $225 per hour and (ii) a guaranty from two-thirds of the shareholders of the debtor to pay such billing rate whether reduced or rejected by the bankruptcy court. *Sua Sponte,* the bankruptcy court rejected both of these provisions of employment. First, the court states that the billing rate was 'considerably more than this Court has allowed in the past.' 97 Bankr. at 308. Second, it reasoned that the guaranty was in 'indirect' payment from the estate without court approval, as one of the shareholders received a salary paid from the estate. Moreover, the court held that it had jurisdiction to review, under section 329 of the Bankruptcy Code, fees incident to the reorganization but not payable by the estate. 97 Bankr. at 310. Finally, the court invalidated the guaranty of payment as such a guaranty by an insider conflicts with the attorney's duty of undivided loyalty to the estate. 97 Bankr. at 311."
>
> Attorney Fee Awards Reporter, Vol. 12, No. 4, August 1989, p. 30.

It is clear to petitioner that the issues presented in this petition are such that the court should grant the petition and thus afford a hearing on these issues. It is further clear that

if the court grants the petition that petitioner be afforded the appointment of special counsel in order that the questions presented to the court will not be "on inadequate papers."*

Respectfully submitted,

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*Appendix A, p. 2a, footnote 1.

Appendix A—Judgment Order of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 90-3442

IN RE: ONE WESTMINSTER CO.,

Debtor

WILLIAM KUNTZ, III, a creditor of the above-captioned debtor of Albany, NY,

Appellant

On Appeal From the United States District Court
for the District of Delaware
(D.C. Civil No. 89-00281)
District Judge: Honorable Jane R. Roth

Submitted Under Third Circuit Rule 12(6)
November 7, 1990

Before: BECKER, SCIRICA and NYGAARD, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.[1]

BY THE COURT,
EDWARD R. BECKER
Circuit Judge
ATTEST:
Sally Mrvos, Clerk

DATED: DEC 21 1990

Certified as a true copy and issued in lieu
of a formal mandate on January 14, 1991.

Test: Sally Mrvos

Clerk, U. S. Court of Appeals for the Third Circuit

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[1]We intimate no view as to the correctness of Judge Roth's conclusion that counsel is entitled to compensation for the time expended in preparing fee applications in bankruptcy cases, a question we have not decided, since it is not squarely before us on appeal. The only appellate claim with respect to this aspect of the case is that:

> based upon the testimony of the fee applicant, the bookkeeper of the firm prepared the monthly statement. The fee application is nothing more than a compendium of the original statement together with the appointment of special counsel and its attendant 'business circular' together with a modest affidavit in support, all bound thickly together.

Although appellant also asserts that much of what the law firm did was of little or no benefit to the debtor, that challenge is not focused on the amount of time involved in preparing the fee petition. Moreover, the overarching (first impression) point referenced above is not adequately briefed in this pro se case, and we decline to resolve such an important issue in dicta (and on inadequate papers).

Appendix B—Memorandum Opinion of the United States District Court for Delaware.

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

IN RE ONE WESTMINISTER CO., INC.,

Debtor.

Civil Action No. 89-201-JRR

William A. Kuntz, III, Albany, New York, pro se, Appellant,

John G. Abramo, Esquire, Wilmington, Delaware, Attorney for Debtor,

Timothy A. Fischer, Esquire of Manley, Burke & Fischer, Cincinnati, Ohio, Attorney for Appellee Manley, Burke & Fischer,

Hugh M. Leonard, Newark, New Jersey United States Trustee.

Wilmington, Delaware
June 7, 1990

Roth, District Judge

This is an appeal from an award of attorneys' fees to the law firm of Manley, Burke & Fischer ("Manley, Burke") by the United States Bankruptcy Court for the District of Delaware. Appellant William A. Kuntz, III ("Kuntz"), is the

sole shareholder and primary creditor of One Westminister Company, the debtor corporation. He challenges a number of the elements in the bankruptcy Court's award of fees. The Manley, Burke firm has moved to dismiss this appeal on the grounds that the appellant failed to timely file the notice of appeal and his appeal brief. For the reasons stated below, the motion to dismiss will be denied, and the award of fees will be affirmed.

BACKGROUND

Kuntz is the owner and largest creditor of One Westminister Company. The petition of bankruptcy for One Westminister was filed in 1983. In August, 1986, Kuntz contacted the Manley, Burke firm, seeking representation for himself and One Westminister concerning an effort by the City of Dayton, Ohio, to acquire a parcel of real estate owned jointly by Kuntz and One Westminister. Manley, Burke is a law firm located in Cincinnati, Ohio. Kuntz learned that the firm possessed a reputation for successfully litigating matters concerning government acquisitions of private property and the government's exercise of its power of eminent domain. The Manley, Burke firm agreed to represent the parties. On October 14, 1986, the Bankruptcy Court approved the retention of the firm to represent the debtor in the litigation in Ohio.

The Manley, Burke firm proceeded with the litigation which was bifurcated in Ohio state court into a first trial on the City of Dayton's right to acquire the property by exercise of its power of eminent domain, and a second trial on the appropriate valuation of the property. Robert E. Manley ("Manley"), president of the Manley, Burke firm, was lead counsel in this liquidation. He believed that it was a close question as to whether the City of Dayton had properly exercised its power of eminent domain. He further believed that, even if he did not prevail in challenging the city's

exercise of eminent domain, such a challenge was strategically beneficial to his clients because it placed them in a better bargaining position when negotiating with the City for possible settlement. In a similar vain, Manley filed separate civil rights complaints charging the City with the unconstitutional taking of property. He later dismissed these suits when the second phase of the bifurcated trial proved successful.

Although the Manley, Burke firm lost the first trial on the eminent domain issue, it was successful in the second trial on the valuation issue. The City had valued the disputed property at $67,000. After the second trial, a jury returned a verdict valuing the property at $235,000. The state trial court ordered that one-half of this amount be awarded to Kuntz, and one-half to One Westminister. The sum of $53,000 was subcontracted from Kuntz's share of the award for payment to the First National Bank of Dayton, which held a judgment lien on the property arising from a previous unrelated suit against Kuntz.

Manley, Burke appealed the eminent domain issue to the state supreme court, which declined to review an intermediate appellate court's affirmance of the trial court's decision. At Kuntz's insistence, the Manley, Burke firm then filed an application for a writ of certiorari to the United States Supreme Court for review of the eminent domain issue. Manley had counselled against filing such an application for a writ due to its low probability of success. It was only shortly before the deadline for filing the application for a writ that Kuntz instructed Manley, Burke to do so. Because of this lack of time, the firm delivered the filing by a personal messenger, flown on a commercial airline from Ohio to Washington, D.C. Manley, Burke later amended this filing by making both technical and substantive changes. The application for a writ was denied.

Although Kuntz originally agreed to pay the Manley, Burke firm directly and then seek reimbursement from One

Westminister for the company's share of the legal fees, Kuntz stopped making payments to the firm after paying a total of $20,000. Manley, Burke then applied to the Bankruptcy Court for the District of Delaware for allowance of compensation from One Westminister for its share of the legal fees due to the firm. The firm submitted two detailed applications covering the period of August 29, 1986, through February 10, 1989.

Kuntz filed objections to Manley, Burke's application for compensation from One Westminister, and the trustee's representative also raised questions concerning particular elements of the fee application. A hearing was held by Judge Balick of the Bankruptcy on May 8, 1989, at which representatives for the Manley, Burke firm and the trustee appeared. Kuntz appeared on his own behalf and was permitted to question witnesses for the applicant. The Court identified three primary issues concerning the application for compensation: whether interest on the fees due, as accrued from the time of initial billing to the time of compensation, should be paid to Manley, Burke; what compensation should be permitted for travel time; and whether the firm should be compensated for its expenditure in preparing the fee application itself.

At the conclusion of the May 8, 1989, hearing Judge Balick ruled from the bench that travel time would be compensated at one-half the requested rate, interest on the fees filled would not be paid, and the firm would be compensated for its expenditure in preparing the fee application. This ruling was set out again in a form of order dated May 15, 1989, awarding a total of $47,689.47 to the Manley, Burke firm.

Kuntz filed a notice of appeal from Judge Balick's decision with the Clerk of the Bankruptcy Court on May 15, 1989. He filed a similar notice of appeal with the Clerk of the District Co rt on June 7, 1989. The Manley, Burke firm raised no cross-appeal. Presently before the Court is appel-

lee's motion to dismiss the appeal on the grounds that appellant failed to timely file both the notice of appeal and his appeal brief. Also pending is a decision on the merits of the appeal.

DISCUSSION

The appellee's motion to dismiss must be denied. The first ground for this motion is that the June 7, 1989, notice of appeal filed with the Clerk of the District Court was not timely filed under Bankruptcy Rule 8002(c). However, this argument ignores the fact that Kuntz filed a notice of appeal on May 15, 1989, with the Clerk of the Bankruptcy Court, thus satisfying the filing requirements of Rule 8002(c).

The second ground for the motion to dismiss is that the appellee filed his appeal brief on September 26, 1989. This Court had issued an extension of the deadline for filing that brief only through August 25, 1989. Appellee contends that this is ground for dismissal of the appeal pursuant to Bankruptcy Rule 8009, which sets forth scheduling requirements for the filing of briefs. This Court granted the extension of the filing deadline to permit sufficient time for the appellant to have a transcript of the May 8, 1989, hearing generated for inclusion in the record on appeal. The appellant filed this transcript with the District Court on September 22, 1989, and filed his brief on September 26.

Dismissal pursuant to Rule 8009 for appellant's late filing of his appeal brief would not be appropriate in view of the fact that the delay was only for one month and was apparently due to the delay in obtaining a highly pertinent transcript for inclusion in the record on appeal. *See In re Beverly Mfg. Corp.*, 778 F.2d 666, 667 (11th Cir. 1985) (dismissal improper when "appellant took all steps necessary for prosecution of the appeal except that of filing the brief [which] depended on delayed processing of the

record"). Therefore, the motion to dismiss will be denied, and the appeal will be decided on the merits of the present record on appeal.

Appellant's numerous, detailed objections were presented to the Bankruptcy Court for its consideration at the May 8, 1989, hearing. He has raised the same array of objections again on appeal. Our task is to review the Bankruptcy Court's decision to determine whether that court abused its discretion or committed an erroneous application of the law. *In re Nucorp Energy, Inc.*, 764 F.2d 655, 657 (9th Cir. 1985); *Matter of Pontiac Hotel Assocs.*, 92 Bankr. 715, 716 (E.D. Mich. 1988). Bankruptcy judges exercise broad discretion in determining the appropriate compensation pursuant to 11 U.S.C. § 330 for attorneys retained to represent the debtor estate. *E.g., Matter of Pontiac Hotel*, 92 Bankr. at 716.

Appellant objects to a number of the elements of the attorneys' fees approved by the Bankruptcy Court. His objections are based on arguments for strict application of the rule that compensation should be awarded only for those professional services that benefit the debtor estate. Appellant contends that much of the litigation efforts by the Manley, Burke firm did not bear immediate benefit to the debtor estate and therefore should not be compensated.

Appellant seeks disallowance of compensation for all efforts concerning the eminent domain issue litigated in the first phase of the bifurcated trial and the appeals of the trial court's decision on that issue. He contends that compensation should be permitted only for one and one-half days of actual trial time on the valuation of the property in the second phase of the litigation. He contests compensation for the expense of filing the application for a writ of certiorari with the United States Supreme Court by a messenger on a commercial airline flight. He contests compensation for specific entries in the fee application concerning conferences and memoranda that appellant contends did

not benefit the estate. Appellant also asserts that the $235,000 award was placed in an escrow account by Ohio court officials in which it earned inferior interest rates, and that the $20,000 be paid to Manley, Burke should be deducted from One Westminister's share of the attorney fees.

Appellant's argument that the Bankruptcy Court erred in permitting compensation for legal services that did not bear immediate benefit to the estate must be rejected. The requirement that services benefit the estate to be compensable is not applied in the notably strict manner appellant demands. *See e.g., In re Sinor,* 87 Bankr. 620, 624 (Bankr. E.D. Cal. 1988) ("an unsuccessful [litigation] attempt is no basis, by itself, for denying fees"). Similarly, appellant has not demonstrated either abuse of discretion or erroneous application of law in the Bankruptcy Court's determination to overrule or disregard appellant's objections to specific entries in the fee application concerning particular conferences or the generation of research memoranda, his objection to the necessity of filing the application for a writ of certiorari in the manner undertaken by the Manley, Burke firm, and his objections concerning the interest rate earned on the valuation award.

We can find no reason to overrule the Bankruptcy Court's decision to deny appellant's demand to deduct from One Westminister's share of the attorneys' fee the $20,000 appellant paid to Manley, Burke. Kuntz was represented by Manley, Burke in the Ohio litigation as a co-owner of the disputed property, and not just as a principal of One Westminister. His payment of $20,000 to Manley, Burke therefore could be attributed properly to payment of his share of the attorneys' fees as a co-owner of the property, rather than as a principal of One Westminister. This attribution is supported by the fact that Kuntz did not attempt to obtain court approval of these payments, which would have been the appropriate course of conduct if those payments were intended to have been made from the debtor estate.

In his appeal brief, as in his objections filed with the Bankruptcy Court, the appellant lists a number of other complaints about the state of affairs surrounding the Ohio litigation, including the City of Dayton's failure to date to develop the property in the manner it intended, and other perceived shortcomings in the Ohio court system's handling of the litigation. We find, as did the Bankruptcy Court, that these various other objections and complaints are irrelevant to the issue of appropriate compensation of the Manley, Burke firm for the services it performed. Appellant would have the Court penalize the Manley, Burke firm for actions of the City of Dayton and of Ohio state court officials over which Manley, Burke had no control.

One objection raised by appellant before the Bankruptcy Court, and again in this appeal, presents an issue over which federal courts have divided in their views. Judge Balick approved the requested compensation for the time that Manley, Burke expended in preparing the fee application that is required to be filed under 11 U.S.C. § 329(a) and Federal Bankruptcy Rule 2016. In ruling from the bench at the May 8, 1989, hearing, Judge Balick based her holding on the Ninth Circuit's decision in *In re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985). In that decision, the Ninth Circuit adopted the position taken by the Fifth Circuit in *Rose Pass Mines, Inc. v. Howard*, 615 F.2d 1088 (5th Cir. 1980), and held that the time expended in preparing fee applications in bankruptcy cases was compensable. A number of courts have taken the same position. *See In re The Vogue*, 92 Bankr. 717, 719-20 (Bankr. E.D. Mich. 1988) (listing decisions adopting *Nucorp Energy* holding).

The Third Circuit has yet to address this specific issue. However, it has issued a number of decisions permitting compensation for the litigation of fee applications under statutes that shift the payment of attorneys' fees and litigation costs from the prevailing party to the losing party. *E.g.*, *Bagby v. Beal*, 606 F.2d 411 (3rd Cir. 1979) (permitting com-

pensation for expense of litigating fee application pursuant to 42 U.S.C. § 1988); *Prandini v. National Tea Co.*, 585 F.2d 47 (3rd Cir. 1978) (permitting compensation for expense of fee application pursuant to 42 U.S.C. § 2000e-5(k)). As Judge Balick observed in her ruling on May 8, 1989, the Ninth Circuit relied in part upon the reasoning of the Third Circuit in these statutory fee cases in arriving at its holding in *Nucorp Energy*. *See Nucorp Energy*, 764 F.2d at 660 (relying on *Prandini* court's reasoning).

The analysis of the *Nucorp Energy* court has three basic elements. First, when section 330 of the Bankruptcy Code was enacted in 1978, Congress intended its terms to overrule "cases that require fees to be determined based on notions of conservation of the estate and economy of administration." H.R. Rep. No. 595, 95th Cong., 1st Sess. 330, *quoted in Nucorp Energy*, 744 F.2d at 658. Second, one of the requirements under the terms of section 330 is that the services or expenses for which compensation is sought must be "actual" and "necessary" 11 U.S.C. § 330(a)(1), (a)(2). The *Nucorp Energy* court held that because the preparation of detailed fee applications for review by the bankruptcy court is required under section 329 of the Bankruptcy Code and Bankruptcy Rule 2016, such preparation constitutes an actual and necessary service under section 330.

The third element of the *Nucorp Energy* court's reasoning has been the focus of most of the controversy on this issue. Section 330 permits compensation of actual, necessary services "based on the nature, the extent, and the value of such services, the time spent on such services and the cost of comparable services other than in a case under this title." 11 U.S.C. § 330(a)(1). The third element in the court's reasoning was to determine whether services related to fee application preparation were compensable in non-bankruptcy cases. *Nucorp Energy*, 764 F.2d at 658. The court concluded that the closest analogy to fee applications under

sections 329 and 330 were fee applications under other statutes that provided for the award of attorneys' fees, such as that addressed by the Third Circuit in *Prandini. Nucorp Energy,* 764 F.2d at 659-62.

A number of bankruptcy judges have rejected the *Nucorp Energy* analysis and held that such compensation should not be permitted because the preparation of the fee application represents a service that has no benefit to the estate. These courts assert that bankruptcy cases should not be analogized to the attorney fee statutes that shift the payment of the prevailing party's costs and attorneys' fees to the losing party. In bankruptcy cases, the fees are paid from the debtor estate itself. Some courts therefore find that bankruptcy cases are more closely analogous to "common fund" or "fund-in-court" cases, in which no compensation is permitted for an attorney's efforts and expenses in collecting his fees from third parties who will benefit from the attorney's services. Under this view, the preparation of a fee application is simply part of the attorney's cost of doing business and should not be compensated directly. *E.g., In re National Paragon Corp.,* 74 Bankr. 858, 862 (Bankr. E.D. Pa. 1987), *rev'd on other grounds,* 87 Bankr. 11 (E.D. Pa. 1988); *In re Shaffer-Gordon Assocs., Inc.,* 68 Bankr. 344, 348-50 (Bankr. E.D. Pa. 1986); *see In re The Vogue,* 92 Bankr. at 719 (listing similar decisions); *see also In re Fine Paper Antitrust Litig.,* 751 F.2d 562 (3d Cir. 1984) (application for fees not compensable in common fund cases); *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp.,* 540 F.2d 102 (3d Cir. 1976) (same).

After considering these countervailing positions, we find the reasoning of *Nucorp Energy* more persuasive. Although the analogy to the common fund cases is ostensibly persuasive, the reasoning under that analogy will prove inconsistent with the purposes of section 330 and create a business environment for attorneys and their clients in which clients uninvolved with bankruptcy cases would have to subsidize

attorneys' expenditures in bankruptcy cases. Under the analogy to the common fund cases, an attorney who requests compensation for preparing the fee application in a bankruptcy case, by listing that time and expenditure as a specific service or expense item on the fee application, is denied compensation by the court. The court will assert that the preparation of the fee application is a service that benefits only the attorney, and not the estate, and that such application procedures are simply part of the attorney's cost of doing business.

Yet, this reasoning overlooks the fact that the cost of doing business is usually recovered by billing each specifically calculable cost to the client for whom that cost was expended, or by spreading unspecifiable costs out among all clients by including in a base fee for each client an overhead charge that reflects a proportion of all such costs. Those courts that disallow an itemized request for compensation of the service or expense in making a fee application appear at times to view their decision as distinguishing between "what is to be absorbed by firms as overhead and what is compensable" as a specific charge in the fee application under 11 U.S.C. § 330. *In re National Paragon Corp.*, 74 Bankr. at 863; *see In re The Vogue*, 92 Bankr. at 721-24 (comparing billing in bankruptcy cases with billing of clients in commercial litigation and observing that expense for preparing bills should be included in overhead).

Such reasoning is flawed by its internal inconsistency. If a court is consistent in its position that an attorney must not be compensated for a service that the court believes produces no benefit to the estate, that court should similarly preclude the attorney from including an overhead charge for such costs as part of his hourly fee chargeable to the estate. *Cf. Matter of D'Lites of America, Inc.*, 92 Bankr. 554, 555-56 (Bankr. N.D. Ga. 1988) (discussing dilemma produced when expenses are denied as separately requested

compensation but permitted as overhead built into firm's hourly rates charged to estate).

From what source then is the attorney to recover these costs? An attorney would either fail to recover them or would recover them only through overhead charged to other parties involved in non-bankruptcy litigation. The first result would decrease the attorney's effective rate for all the hours spent on a bankruptcy case, thereby discouraging highly qualified specialists from the practice of bankruptcy law. *Nucorp Energy,* 764 F.2d at 660-61. A primary element of the *Nucorp Energy* court's reasoning was its observation of the congressional intent behind section 330 to avoid discouraging attorneys from the practice of litigation involving bankrupt estates. *Id.* at 658 (quoting H.R. Rep. 595, 95th Cong., 1st Sess. 330); *see also In re Bible Deliverance Evangelistic Church,* 39 Bankr. 768, 774-75 (Bankr. E.D. Pa. 1984) (in view of such congressional intent compensation appropriate at least when debtor solvent).

The latter result would pass some of the costs of bankruptcy litigation on to other clients. Litigants in other arenas of law should not have to subsidize uncompensated costs from bankruptcy litigation undertaken by their attorneys.

We therefore find that Judge Balick's adoption of the position of the Ninth Circuit regarding compensation of fee application preparation cannot be viewed as an error of law. Although a countervailing position taken by other courts is ostensibly persuasive, that position does not withstand close scrutiny. The Ninth Circuit's position serves the policy concern of not discouraging attorneys from the practice of bankruptcy litigation. Compensation for an attorney's preparation of a fee application is also appropriate in view of the important role that the detailed fee application plays in the bankruptcy court's consideration of the full array of requested compensation.

CONCLUSION

For the reasons stated above, the appellee's motion to dismiss the appeal for untimely filings is denied, the ruling of the Bankruptcy Court is affirmed, and this appeal is dismissed on the merits.

An Appropriate order shall follow.

Appendix C—Order of the United States District Court for Delaware Affirming Fee Award.

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

IN RE ONE WESTMINISTER CO., INC.,

Debtor.

Civil Action No. 89-281-JRR

The Court having considered the briefs of the parties on the merits of the appeal and appellee's motion to dismiss the appeal, and for the reasons stated in the Memorandum Opinion issued this 7th day of June, 1990,

IT IS HEREBY ORDERED THAT:

1. Appellee's motion to dismiss the appeal for appellant's failure to timely file a notice of appeal and brief of appellant is denied.

2. The decision of the United States Bankruptcy Court for the District of Delaware presently under appeal is affirmed, and this appeal is dismissed on the merits.

JAMES R. ROTH
United States District Judge

Appendix D—Order of the United States Bankruptcy Court.

IN THE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:

ONE WESTMINISTER CO., INC.

Debtor

Case 83-14

ORDER AUTHORIZING PAYMENT OF SPECIAL COUNSEL BY DEBTOR

At Wilmington, in said District, on this May 15th, 1989.

Upon the application of Manley, Burke & Fischer, A Legal Professional Association, retained, pursuant to order of this court dated October 14, 1986, to serve as special counsel in regard to litigation then pending in Dayton, Ohio, for the purpose of defending debtor's interest in property sought to be appropriated by the City of Dayton (Case No. 86-2439; Court of Common Pleas, Montgomery County, Ohio), and upon consideration of the petition of Manley, Burke & Fischer for allowance of compensation for the period beginning August 29, 1986, and ending September 30, 1986, and upon consideration of the supple-

mental petition for compensation from the period October 1, 1988, through February 10, 1989, and upon consideration of evidence presented at a hearing held by this court upon said application on May 8, 1989, the court finds that the total amount sought as compensation, expenses and unpaid witness fees is $54,918.16, but that such request will be reduced by the following amounts:

1) Travel time shall be compensated at one half of the hourly rate which would otherwise be charged, resulting in a reduction of the fees sought of $1,225.00; and

2) The request of the petitioner for interest upon the unpaid balance from the date billed to the date of payment is denied, resulting in an additional reduction from the amount sought of $6,003.69.

IT IS THEREFORE ORDERED that the debtor be and is hereby authorized to pay to Manley, Burke & Fischer, as special counsel to the debtor, the sum of $47,689.47.

HELEN S. BALICK
Bankruptcy Judge

6307G/rrv

cc/Peter J. Walsh, Esq.
Sam Abrams, Esq.
William Kuntz, III

Appendix E—Brief of Appellant, William Kuntz, III.

90-3442

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

IN RE: ONE WESTMINISTER COMPANY, INC.

Debtor.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE CASE 89-281

BRIEF OF APPELLANT, WILLIAM KUNTZ, III

WILLIAM KUNTZ, III
Appellant Pro Se
Box-1722-Broadway Station
Albany, NY 12201-1722
518-962-4966

Table of Contents.

Page

Table of Contents 2e

Table of Cases, Statutes and Authorities 2e

Statement of Subject Matter Jurisdiction and Appellate Jurisdiction 4e

The Course of the Proceedings Which Formed This Appeal 4e

Statement of Related Cases and Proceedings 7e

Statement of Issues Presented for Review 7e

Summary of Argument 8e

Certificate of Service 14e

TABLE OF CASES, STATUTES AND AUTHORITIES

Page

In Re: NUCORP Energy, Inc. 764 F.2d 655 ..... 11e

City of Dayton, Ohio -vs- Kuntz, *Et Al* (addendum) 7e

STATUTES

11 U.S.C. 327 ..... 4e

11 U.S.C. 328 ..... 4e

11 U.S.C. 329 ..... 4e, 8e

Page

11 U.S.C. 330 ..... 4e

11 U.S.C 363 (h) 1, 2 & 3 ..... 6e

AUTHORITIES

Notes of Committee on the Judiciary Senate Report 95-989 ..... 8e

1990 Edition—West's-*Bankruptcy Code, Rules and Forms*-St. Paul, Minn Pg 60 ..... 9e

STATEMENT OF SUBJECT MATTER JURISDICTION
STATEMENT OF APPELLATE JURISDICTION

This is an appeal under Rule 4 of the Federal Rules of Appellate Procedure from the decision of the United States District Court for the District of Delaware. The decision of the District Court upheld a reduced fee award under 11 U.S.C. 327, 328, 329 & 330 & 28 U.S.C. 158

THE COURSE OF THE PROCEEDINGS WHICH FORMED THIS APPEAL

The debtor, One Westminister Co, Inc., a Delaware corporation, filed a petition under Chapter 11 of the Bankruptcy Act in early 1983 (Del 83-14) First National Bank of Dayton, Ohio which was a creditor of William Kuntz, III herein the appellant, who owns the outstanding common stock of the debtor and is a substantial creditor of the debtor, was seeking to sell the real estate of the debtor (a 1/2 undivided interest in the property commonly known in Dayton, Ohio as the Alladin Cleaners) together with the interest of appellant at a sheriff's sale.

The First National Bank of Dayton, Ohio continued and persisted in its efforts to have the real estate sold after the petition was filed, by seeking to circumvent the jurisdiction of the bankruptcy court thru a ruse presented to the Montgomery County Common Pleas Court in Dayton, Ohio by seeking to infer there that the company in bankruptcy was not the company which title was vested.

This effort was led by the law firm of the mayor of Dayton, Ohio. In the summer of 1983 after the property was offered for a sum total of $45,000 and upon the motion of the United States Trustee, Hugh M. Leonard at Newark, New Jersey, the First National Bank of Dayton, Ohio, whose corporate parent is a Delaware corporation (National City Corporation) into the bankruptcy court on

moving papers seeking the appointment of a trustee and for contempt.

At a hearing before the Honorable Judge Helen S. Balick, United States Bankruptcy Judge for the District of Delaware, appellant agreed and did consent to the appointment of a trustee pending the outcome of the real estate 'question'.

At that time, the court considered the motion of the United States trustee and upon hearing from counsel for the First National Bank of Dayton, Ohio and from appellant and upon viewing portions of selected news video tapes which correctly informed the court of the nature of the proceedings in Ohio and the potential value of the debtor's real estate to a planned 30 story high rise project, cited First National Bank of Dayton, Ohio for contempt for attempted bankruptcy fraud.

Upon the appointment of Peter J. Walsh, Esq. as trustee, appellant and the trustee brought an action in Dayton, Ohio for the appointment of a receiver in state court for the tenant in the Alladin Cleaner, who had ceased paying rent within months of the citation of contempt. It was later determined that the First National Bank of Dayton, Ohio had extended a blanket load of some $60,000 to the tenant secured by real estate of the tenant.

Needless to say, without rental payments coming into the estate of the debtor, the administration of the estate was hampered to say the least.

In late October, 1985, the United States attorney for the District of Delaware, thru C. Davis, Esq. on behalf of the Commissioner of the Internal Revenue Service brought on a motion to dismiss the case. Upon a hearing the case was dismissed and appellant took an appeal to the District Court of Delaware.

Upon the presentation of the brief of the appellant, the government conceeded that the case had failed and submit-

ted an order for the District Court to remand the case and reinstate the bankruptcy.

May 1986. By a mere coincidence, on the very day, the District Court order as signed, the City of Dayton, Ohio by emergency resolution sought to appropriate the Alladin Cleaners property for a planned project known as Arcade Square II. This project was a H.U.D. funded project.

Upon the re-instatement of the bankruptcy and the automatic stay, the City of Dayton, Ohio thru an attorney in Delaware, Mr. Von Wettberg, who it would seem had already been in contact with the trustee in early 1985 prior to the motion of the US Attorney for Delaware made a motion for relief from the stay.

This motion was granted by default as no papers in opposition were submitted by the trustee nor counsel for the debtor, Sam Abramo, Esq. within the time set forth in the moving papers (5 days notice?).

At that point, appellant took an appeal to the District Court and hence to this court on the issue of relief from the stay and the City of Dayton, Ohio instituted proceedings in the Montgomery County Common Pleas Court in Dayton, Ohio.

The offer of the City of Dayton, Ohio to purchase the property stood at $67,000 for both interests in the property. No offer was ever made to the trustee under 11 U.S.C. 363 H (1 & 2 & 3).

At that point in time Robert E. Manley, and his firm, Manley, Burke, and Fischer noted real estate attorneys in Cincinnati, Ohio were engaged upon application by the trustee to the bankruptcy court and which employment was approved by an order of the bankruptcy court in the fall of 1986.

As set forth in the memorandum opinion of the Honorable Judge Roth, United States District Judge for the District of Delaware, the litigation proceeded in a bifurcated fashion.

At the close of the proceedings and over the objection of appellant, the Manley Firm submitted an agreed entry to the court in Ohio which apportioned parts of the ultimate jury award among the various parties without approval of the bankruptcy court.

Upon a hearing on May 8, 1989, Judge Balick of the United States Bankruptcy Court in Delaware awarded the sum of $47,689.47 upon an application for the sum of $54,918.16 and disallowed a credit of $20,000 for funds paid over to the Manley Firm prior to the deposit by the City of Dayton, Ohio of the jury award plus the bond with the clerk of courts in Dayton, Ohio.

From that decision, appellant took an appeal to the District Court and that was affirmed without hearing upon the briefs by the District Court on June 7, 1990.

From that decision, appellant has taken this appeal to the United States Court of Appeals for the third circuit.

STATEMENT OF RELATED CASES AND PROCEEDINGS

There was a prior appeal in 1986 in re: One Westminister Co, Inc., there is pending in Supreme Court of Ohio a matter entitled City of Dayton, Ohio -vs- William Kuntz, III *Et Al.* filed Monday August 20, 1990 a motion for leave to appeal on the order of the Montgomery County Common Pleas Court which allowed an additional sum to be withheld by the Manley Firm under the 'attorney charging lien' theory advanced in addition to the $67,000 already held by the appellee.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. That the decision of the District Court in affirming the award of attorney fees in preparation of the fee application was flawed upon review the actual record as to what work

actually constituted the preparation of the application and what work was in fact extraneous to the preparation of the application for the fee award.

2. That the decision of the District Court in affirming the dis-allowance to the $20,000 payment as a credit toward the fee allowance was incorrect based upon the record and the factors before the bankruptcy court.

3. That the decision of the District Court in affirming the Manley fee award exceeded the amount of what reasonable compensation should be allowed in a bankruptcy case.

SUMMARY OF ARGUMENT

In the memorandum opinion of the district court, the central objections of the appellant were mostly overlooked or skirted over. The thrust of the objections and appeal is alluded to in the *Notes of Committee on the Judiciary,* Senate Report 95-989. 11 U.S.C. 329.

'This section, derived in large part from current Bankruptcy Act Section 60 d [former section 96(d) of this title], requires the debtor's attorney (here special counsel to the trustee) to file with the court a statement of the compensation paid or agreed to be paid to the attorney for services in contemplation of and in connection with the case and the source of the compensation. Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws and serious potential for overreaching by the debtor's attorney, and should be subject to careful scrutiny.

Subsection (b) permits the court to deny compensation to the attorney to cancel an agreement to pay compensation, or to order the return of compensation paid, if the compensation exceeds the reasonable value of the services provided. The return of payments already made are generally

to the trustee for the benefit of the estate. However, if the property would not have come into the estate in any event, the court will order it returned to the that made the payment' *Bankruptcy Code, Rules and Forms,* Wests, 1990.

In this case, and contrary to what was understood by the district court $20,000 was paid toward the Manley fee by appellant. What was in fact contemplated was that this payment would be pro-rated or credited toward the eventual fee award of the bankruptcy court and that it would be treated and an order submitted as an advance by appellant to the debtor in order to make interim allowances for compensation. Given the fact that the income stream had been cut off to the debtor by the default of the tenant in paying rents after the First National Bank contempt hearing, the debtor was in a very poor cash position, the trustee having less than $5,000.00 on hand.

While appellant paid these money's over to the Manley firm, no order nor application was ever submitted to the bankruptcy court. Hence no approval was made.

The bankruptcy court and district court dis-allowed any credit toward the fee application of this payment.

It is interesting for the Court of Appeals to note that the district court couched the language in dealing with this as follows

'Although Kuntz originally agreed to pay the Manley, Burke and Fisher firm directly and then seek reimbursement from One Westminister for the company's share of the legal fees, Kuntz stopped making payments to the firm after paying a total of $20,000.'

What is not noted in the opinion is that Kuntz stopped paying at the time the city of Dayton, Ohio posted the 'compensation and costs' bond of $100,000 plus the jury award of $235,000 in June, 1987.

Accordingly there was a considerable amount of money then available for the payment of the Manley fee. It had been the intention of appellant, had the Manley firm fol-

lowed his instructions to remove the entire proceeds to the custody of the trustee in bankruptcy, Peter J. Walsh, Esq. and at the time of the hearing on May 8, 1989 make an application to the bankruptcy court for the payment of a portion or all of the Manley fee on an equitable basis from the bond of the city of Dayton, Ohio as they had clearly litigated and negotiated in bad faith and thus the debtor and appellant were clearly the 'prevailing partys.'

However this was not to be the case. Notwithstanding the fact that the fund of money was depleated by the unauthorized withdrawal of the $100,000 bond of the city of Dayton, Ohio and that the Manley firm chose to not follow the request of appellant in seeking to have all the funds transferred to Delaware in order that Judge Balick could make a proper determination of how the 1/2 undivided interests of Kuntz and the debtor would be treated, an agreed order was submitted to the Montgomery County Common Pleas Court which mutated the 1/2 interest in common into a 1/2 individual interest.

First National Bank of Dayton, Ohio took a big chunk and this avoided an appearance in Delaware to explain how only $12,000 in interest was paid on $335,000 from June 1987 thru Feb., 1989.

Accordingly, when the fee application was presented to the court only some 37% of the total fund was then available. The rest had been spirited away prior to any consideration of the bankruptcy court. Of the remaining sum, the Manley fee application sought a large portion.

In considering this appeal, the Court of Appeals must also take judicial notice that after obtaining the payment of the $47 thousand from Mr. Walsh, and after obtaining the dis-allowance of the $20,000 as a credit already paid as a result of the hearing in Delaware on May 8, 1989, Mr. Manley and his firm returned to Dayton, Ohio and obtained a payment of an additional $51,000 from the state court judge. This brings the total compensation to well over

$110,000. The application in Ohio did not even allow a credit for the $20,000 already paid by appellant.

This is clearly in the estimation of appellant, the 'over-reaching' that was referred to in the judiciary note.

Fashioning an agreed order in Ohio to further circumvent the authority of the bankruptcy court cannot be condoned by this court. If the bankruptcy court dis-allowed portions of the fee application, it is not for the fee applicant to proceed against another non-debtor party to seek to have the dis-allowed portion paid.

The district court goes to great length to reason out the *Nucorp Energy* Case 764 F.2d 655 (9th Circuit-1985). However based upon the testimony of the fee applicant, the bookkeeper of the firm prepared the monthly statement. The fee application is nothing more than a compendium of the original statement together with the appointment of special counsel and its attendant 'business circular' together with a modest affidavit in support, all bound thickly together.

A detailed examination of the work which is ascribed to as preparation of the fee application is more along the lines of repeated phone calls to Mr. Abramo (Samual V now deceased) and internal conferences as to how to rush the distribution of funds (which was over the objection of appellant) in such a fashion as to maximize the fat fee sought.

What appellant pointed out to the district court is much of what is presented in the fee application did little or nothing to benefit the debtor. For instance, why should the debtor be charged for telephone conferences with counsel for First National Bank of Dayton, Ohio on formulation of an order of distribution which yielded no benefit to the estate in the first instance and failed to even to consider the paradox that it was the unlawful acts of First National Bank that prompted the bankruptcy case.

What appellant has further pointed out, and quite properly was that of the billing presented to the court only about $12,000 related to the actual day and one/half spent on the valuation portion of the bifurcated proceedings. Everything else was related to the advancement of the Manley firm's flawed attack of the city of Dayton, Ohio power of eminent domain and then the opinion of the visiting judge who struck down Mr. Manley's approach to the question.

In a state court proceeding where there was only partial success in prosecuting a defense to the case, why should the debtor be required to pay a substantial sum for efforts which proved unproductive as the Manley firm has asserted a liability against appellant Kuntz in his individual capacity of some $71,000 why should a debtor be required to pay for duplicated and unproductive services?

What the court has here is a clear case of unconstrained greed. The pursuit of such plunder ran clearly cross the proper procedure in dealing the fund of money which was created.

Had Mr. Manley and his firm acted properly the full amount of money would have come before the bankruptcy court. Had Mr. Manley's fee been approved and had appellant's request that the city of Dayton, Ohio be required to pay such compensation out of the $100,000 bond then it would have been the city of Dayton, Ohio before the court seeking to dis-allow that application of the 'common fund or fund-in-court' analogy.

As it stands now, the question as to the $100,000 bond will have to await the ultimate outcome of this appeal and further proceeding. As the bond was withdrawn from the clerk of court of Montgomery County without any proper court order, that sum of money plus an interest that may be due is still under the exclusive jurisdiction of the bankruptcy court as that is where the city of Dayton, Ohio made its motion for relief from the automatic stay.

Needless to say, the mis-adventures of this fund of money has only delayed the re-organization of the debtor's affairs. Appellant can see no fair and equitable basis why the debtor nor the appellant should have to pay vast sums of money to keep from being defrauded by the city of Dayton and the First National Bank of Dayton, Ohio in the implementation of such federally subsidized projects as 'Arcade Square II'.

CONCLUSION

Wherefore appellant would urge the court to remand this to the bankruptcy court for a reduction in the fee award to those amounts actually expanded in time and money to direct benefit to the bankruptcy estate and disallow the portion of the fee award which was ascribed to preparation of the application when clearly it disclosed that much of the time was spent on matters which were not at all in fact related to the fee application and to disallow that portion of the fee award which was based upon an unsuccessful challenge, in view that the Manley firm has already sought additional compensation from appellant in the sum of $71,000 over and above the fee award of the bankruptcy court of $47,000.

Respectfully submitted,

WILLIAM KUNTZ, III

CERTIFICATE OF SERVICE
AFFIDAVIT OF MAILING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Case 90-3442
IN RE: ONE WESTMINISTER COMPANY, INC., Debtors

State of New York,
County of Essex, ss

Carmen Zayas having been duly cautioned and sworn, makes this affidavit in proof of service of the brief of appellant, William Kuntz, III. That I am over 18 years of age, a resident of the State of New York and not a party to the proceedings.

That on the 23 of August I caused to be mailed to the persons or parties whose names appear below two copies of the foregoing brief by depositing the same in a sealed wrapper US postage prepaid in an official depository of the US Postal Service within the State of New York.

CARMEN ZAYAS

Sworn before me a notary public
this 23rd of August, 1990.
HEATHER L. CROSS
Notary Public, State of New York
Qualified in Essex County
No. 4867331
Commission Expires Aug. 25, 1991

TO:

John Abramo, Esq. Attorney at Law 105 W 9th St., Wilmington, Delaware 19899

Mssrs Manley and Fisher, Manley Burke and Fisher, LPA, 225 W Court Street, Cincinnati, Ohio 45202

Peter J. Walsh, Esq. 1300 Delaware Trust Building, Wilmington, DEL 19899

Patricia C. Hannigan, Esq. AUSA-US Attorney's Office 844 King St Wilmington, 19801

Office of the United States Trustee, 60 Park Place, Newark, New Jersey

Mr. Eduard F. von Wettberg, III Counsel to the City of Dayton, Ohio, Morris, James Hitchens & Williams Bx 2306, Wilmington, DEL 19899

Appendix F—Entry and Order of Distribution.

COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

THE CITY OF DAYTON, OHIO

Plaintiff

vs.

WILLIAM KUNTZ III, *et al.*

Defendants

On January 10th, 1989, the Supreme Court of the United States denied defendants William Kuntz, III and One Westminister Company's Petition for Writ of Certiorari. Defendants' appeals have now been exhausted and the $235,000, plus interest, held by the clerk of courts relating to the value of defendant's property that was appropriated by the City of Dayton must be distributed.

As of December 31, 1988, this account, on deposit at First National Bank of Dayton, Ohio, held a balance of $247,740.59. The interest on the account commencing January 1, 1989, is $33, *per diem.* In addition to defendants Kuntz and One Westminister Company, the First National Bank of Dayton, Ohio, claims an interest in the fund. In previous proceedings, the Court found that the defendants Kuntz and One Westminister each own an individual one-half interest in the fee appropriated and are each entitled to one-half of the fund at the time of distribution, addition, the court found that the judgment lien of The First National

Bank of Dayton constitutes a lien against the proceeds payable to defendant Kuntz.

Therefore, the Court hereby orders distribution of the funds held by the Clerk of Courts in the following manner:

(1) One Westminister Company, Inc., one-half of the total fund on the date of distribution ($123,970.29 as of December 31, 1988, plus $16.97 *per diem*).

(2) William Kuntz, III, one-half of the total fund minus the share claimed by First National Bank of Dayton ($73,006.02 plus $10.00 *per diem*).

(3) First National Bank of Dayton, Ohio, $50,864.28 plus $6.97 *per diem* from January 1, 1989.

The Clerk of Courts is hereby directed to issue checks in the following manner: TO THE CLERK OF COURTS, costs in the amount of $481.80; and

1. One Westminister Co., Inc. and Peter J. Walsh, Trustee in Bankruptcy, $124,374.25, and delivered to Peter J. Walsh, Trustee, 1300 Delaware Trust Bldg., P.O. Box 25130, Wilmington, Delaware 19899.
2. William Kuntz, III and his attorney Robert E. Manley, $73,145.12, and delivered to Robert E. Manley, Manley, Burke & Fischer, 4100 Carew Tower, Cincinnati, Ohio 45202.
3. First National Bank of Dayton and its attorney Carol E. Carlson, $51,129.14, and delivered to Carol E. Carlson, the First National Bank, First National Bank Plaza, Dayton, Ohio 45402.*

DATE: February 7, 1989

JUDGE ROBERT BROWN

---

*Pursuant to Entry and Order granting partial distribution filed 2/7/89.

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Attorney for Defendant Mark Garlikov
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Dayton, Ohio 45402

Carol E. Carlson, Esq.
Attorney for Defendant First National Bank
First National Bank
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One Westminister Company, Inc.
Manley, Burke and Fischer
4100 Carew Tower
Cincinnati, Ohio 45202

3182G/kjw

Appendix G—Decision and Entry Amending the Order of Distribution.

(Sustaining Counsel's Motion to Amend Distribution)

IN THE COMMON PLEAS COURT OF
MONTGOMERY COUNTY, OHIO
GENERAL DIVISION

CITY OF DAYTON,

Plaintiff,

v.

WILLIAM KUNTZ, III, *et al.*,

Defendants.

This cause is before the Court on the motion of Robert E. Manley and Manley, Burke, and Fischer, a Legal Professional Association, filed herein on August 4, 1989, seeking an order of this Court amending the previous order of distribution journalized in this cause on May 30, 1989. The motion is supported by a memorandum, a copy of an earlier decision of this Court, a copy of a decision of the Court of Appeals, and a copy of the original motion for an amended order of distribution. To the original motion is attached an affidavit of counsel relative to the basis for the fees claimed by the movant. To this motion the Defendant, William Kuntz, *Pro Se,* filed "Observations" contra on August 14, 1989. This prompted a memorandum from movants on August 22, 1989. This motion is ready for decision pursuant to Rule 2.09 of this Court. The Court finds the motion well taken.

The Court finds that the Defendant, William Kuntz, has violated the terms and conditions of his agreement with the movants as his attorneys. The Court finds that the movants are entitled to a "charging lien." Cohen v. Goldberger (1923), 109 Ohio St. 22. The Court concludes that the movants are entitled to $51,101.21 out of the funds presently being held by the Clerk of this Court.

It is therefore ORDERED that the motion of Robert E. Manley and Manley, Burke, and Fischer, filed herein on August 4, 1989, be, and the same is hereby SUSTAINED.

It is further ORDERED that the Clerk of this Court distribute to Robert E. Manley out of the fund being held in this action by the Clerk of Courts the sum of $51,101.21.

Finally, it is ORDERED that the Clerk hold the remainder in the amount of $22,043.91, subject to the further order of this Court.

Copies of the within Decision and Entry shall be mailed by ordinary mail on the date of filing to counsel listed below.

Dated: September 22, 1989

APPROVED:

ROBERT M. BROWN, JUDGE

ROBERT E. MANLEY, Attorney at Law, 4100 Carew Tower, Cincinnati, Ohio 45202
WILLIAM KUNTZ, III, box 1722-Broadway Station, Albany, New York 12201-1722
JACK D. REAY, Bailiff

Appendix H—Brief of Appellee, Manley, Burke & Fischer.

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

IN RE: ONE WESTMINISTER CO., INC.

Debtor

Case 90-3442

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Brief of Appellee, Manley, Burke & Fischer

TIMOTHY A. FISCHER, ESQ.
MANLEY, BURKE & FISCHER
225 West Court Street
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Telephone: (513) 721-5525

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

Page

I. Statement of Jurisdiction 6h

II. Statement of the Case 6h

III. Statement of Facts 6h

IV. Statement of the Standard of Review 10h

AUTHORITIES:

Matter of Pontiac Hotel Ass., 92 BR 715 (ED Mich. 1988) 10h

In Re Wonder Corp. of America, 82 BR 186 (D.Conn. 1988) 10h

In Re National Paragon Corp., 87 BR 11 (ED Pa. 1988) 10h

Cont. Ill. Nat. Bank & Trust Co. of Chicago v. Wooten, 90 BR 226 (WD La. 1988) 10h

V. Argument 10h

1. The actions of counsel did benefit the estate. 11h

AUTHORITIES:

In Re Sinor, 87 B.R. 620 (E.D. Cal., 1988) 12h

In Re Loop Hosp. Partnership, 50 B.R. 565 (Ill. 1985) 12h

In Re H.C.S. Corp., 59 B.R. 307 (S.D. Cal. 1986) ... 12h

2. Previous cash payments by appellant were properly credited to his account..... 13h

AUTHORITIES:

In Re Nucorp Energy, Inc., 764 F.2d 655 (9th Cir. 1985)..... 13h

Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088 (5th Cir. 1980)..... 14h

3. The Bankruptcy Court properly allowed counsel compensation for the time expended in the preparation of the fee application..... 14h

AUTHORITIES:

In Re Sinor, 87 B.R. 620 (E.D. Cal., 1988)..... 12h

Nunley v. Jessee, 92 B.R. 152 (W.D. Va. 1988) 14h

Matter of Pontiac Hotel Associates, 92 B.R. 715 (E.D. Mich. 1988) 10h

In Re Chicago Lutheran Hosp. Assn., 89 B.R. 719 (N.D. Ill. 1988)..... 14h

In Re Nucorp Energy, 764 F.2d 655 (9th Cir. 1985) 14h

In Re V.A. & L.C. Brown Co., Inc., 75 B.R. 539 (E.D. Pa. 1987)..... 14h

In Re W.G.S.C. Enterprises, Inc., 47 B.R. 53 (B.K. Ga. 1985)..... 14h

In Re Pettibone Corp., 74 B.R. 293 (N.D. Ill. 1987) 15h

In Re Wildman, 72 B.R. 700 (N.D. Ill. 1987)..... 15h

In Re Thacker, 48 B.R. 161 (B.K. Ill. 1985)..... 15h

In Re Seneca Oil Co., 65 B.R. 902 (W.D. Ok 1986) 15h

VI. Conclusion..... 15h

AUTHORITIES:

In Re S.T.N. Ent., Inc., 70 B.R. 823 (Bk.D.Vt 1987) 16h

Certificate of Admission..... 16h

Certificate of Service..... 17h

TABLE OF AUTHORITIES

Page

CASES:

Cont. Ill. Nat. Bank & Trust Co. of Chicago v. Wooten, 90 BR 226 (WD La. 1988) 10h

In Re Chicago Lutheran Hosp. Assn., B.R. 719 (N.D. Ill. 1988)..... 14h

In Re H.C.S. Corp., 59 B.R. 307 (S.D. Cal. 1986)... 12h

In Re Loop Hosp. Partnership, 50 B.R. 565 (Ill. 1985) 12h

In Re National Paragon Corp., 87 BR 11 (ED Pa. 1988)..... 10h

In Re Nucorp Energy, 764 F.2d 655 (9th Cir. 1985) 14h

In Re Pettibone Corp., 74 B.R. 293 (N.D. Ill. 1987) 15h

In Re Seneca Oil Co., 65 B.R. 902 (W.D. Ok 1986) 15h

In Re Sinor, 87 B.R. 620 (E.D. Cal., 1988).... 12h, 15h

In Re S.T.N. Ent., Inc., 70 B.R. 823 (Bk.D.Vt 1987) 16h

In Re Thacker, 48 B.R. 161 (B.K. Ill. 1985)..... 15h

In Re V.A. & L.C. Brown Co., Inc., 75 B.R. 539 (E.D. Pa. 1987)..... 14h

In Re W.G.S.C. Enterprises, Inc., 47 B.R. 53 (B.K. Ga. 1985)..... 14h

In Re Wildman, 72 B.R. 700 (N.D. Ill. 1987)..... 15h

In Re Wonder Corp. of America, 82 BR 186 (D.Conn. 1988)..... 10h

Matter of Pontiac Hotel Associates, 92 BR 715 (ED Mich. 1988)..... 10h, 14h

Nunley v. Jessee, 92 B.R. 152 (W.D. Va. 1988) 14h

Rose Pass Mines, Inc. v. Howard, 615 F.2d 1088 (5th Cir. 1980)..... 14h

I. STATEMENT OF JURISDICTION

This appeal is before this Court pursuant to a notice of appeal filed to review the final judgment of the United States District Court affirming the award of counsel fees to special counsel for the debtor in a bankruptcy case heard by the United States Bankruptcy Court for the District of Delaware. Jurisdiction is in accordance with 29 U.S.C. §1291; neither of the judgments below was interlocutory.

II. STATEMENT OF THE CASE

This matter arises out of the bankruptcy of One Westminister Co., Inc., filed in the United States Bankruptcy Court for the District of Delaware. The bankruptcy authorized retention of special counsel to represent the interest of the debtor in an eminent domain case brought by the City of Dayton, Ohio. At the conclusion of the litigation, special counsel (appellee herein) submitted an application for payment of attorney fees. Upon the evidence submitted at a hearing on the application, the Court reduced the amount requested, and ordered the Trustee to pay counsel. Appellant, the sole stockholder, appealed to the United States District Court for the District of Delaware, which affirmed the decision of the Bankruptcy Court. Appellant has appealed that ruling to this Court.

III. STATEMENT OF FACTS

The appellee, Manley, Burke & Fischer, hereby respectfully submits the following statement of facts in lieu of the statement submitted by appellant.

The relevant facts concerning the employment of Manley, Burke & Fischer as counsel for the debtor corporation, and other facts concerning the type and nature of legal services performed for the debtor corporation, were introduced into the record of the Bankruptcy Court through the

affidavit of Robert E. Manley, filed in the Bankruptcy Court (to which was attached numerous exhibits), as well as the testimony given by Mr. Manley at the hearing held on the application for fees before the bankruptcy judge on May 8, 1989. (Unofficial transcript filed September 22, 1989; hereinafter referred to as TS, pp. "____"; appellant has not filed an appendix. The opinion of the District Court is attached to this brief for the convenience of the Court.)

Manley, Burke & Fischer is an incorporated law firm located in Cincinnati, Ohio. In August of 1986, William Kuntz III approached Robert E. Manley, the President of Manley, Burke & Fischer, seeking representation of both Mr. Kuntz and One Westminister Company with respect to an effort being made by the City of Dayton, Ohio to acquire a piece of real estate owned jointly by Mr. Kuntz and the company. (TS, p. 7). (Mr. Kuntz is also the owner and largest creditor of the debtor corporation.) (TS, pp. 6-7).

Pursuant to a written letter agreement dated August 28, 1986, and upon application made to the Bankruptcy Court, the court authorized the trustee to retain Manley, Burke & Fischer to represent the debtor corporation with respect to the eminent domain litigation brought by the City of Dayton, Ohio to acquire the property jointly owned by Mr. Kuntz and by the corporation. At the same time, the firm also agreed to represent the interest of Mr. Kuntz as an individual with respect to his personal ownership of the other one-half interest in the property.

With respect to the payment of attorney fees, the procedure eventually utilized was not the procedure agreed to by Mr. Kuntz at the time of the engagement. The original agreement was that the firm would handle the litigation on an hourly fee basis and Mr. Kuntz would pay the entirety of the legal bill submitted on a monthly basis by Manley, Burke & Fischer; Mr. Kuntz would then apply for reimbursement of one-half of that amount from the assets of the debtor corporation. (TS, pp. 8, 32-33). Pursuant to

this plan, Mr. Kuntz initially paid $20,000 through July of 1987, but then ceased making any payments whatsoever, suggesting that appellee make its own application to the Bankruptcy Court for compensation. (TS, pp. 9, 53). In spite of this breach by Kuntz, counsel continued with the litigation.

The litigation proceeded in three stages. First, as directed by Mr. Kuntz and Mr. Walsh, the trustee, counsel first challenged the right of the City to utilize its power of eminent domain with respect to this particular project. The Court of Common Pleas of Montgomery County, Ohio, after a trial, ruled against the property owners on this issue.

The second stage of the proceedings involved a trial to a jury in order to establish the value of the property to be paid to the property owners by the City. Prior to trial, the most recent offer of the City to purchase this property was $67,000. (TS, p. 11). After the trial, the jury returned a value of the property of $235,000. (TS, p. 12).

The third stage involved appeals taken to review the ruling made by the Court of Common Pleas against the property owners on the right to take issue; the decision of the jury establishing the value of the property was not appealed. The Court of Appeals affirmed the lower court's ruling on the right to take. The property owners then petitioned the Supreme Court of the State of Ohio to review the decision of the Court of Appeals; the Supreme Court of Ohio declined to accept the case for review.

Against the advice of counsel, Mr. Kuntz directed (at the last minute) that a petition for writ of certiorari to the United States Supreme Court be filed. (TS, pp. 14-16, 33-35). The Supreme Court declined to accept the case, thereby ending the litigation.

During the pendency of these appeals, the $235,000 jury award had been deposited by the City of Dayton with the Clerk of the Court of Common Pleas of Montgomery County (pursuant to Ohio Statute). The City was permitted

by the Court of Common Pleas to take possession of the property upon the posting of a bond in the amount of $100,000 as additional security in case the appellate process were to result in a ruling that the City did not have the right to use the power of eminent domain with respect to this parcel. (TS, p. 28).

At the termination of the appellate process, the Court of Common Pleas held a hearing in order to determine the interests of the various property owners and lienholders. There was no dispute about the relative interests of the owners. The Court of Common Pleas directed that one-half of the amount of the jury award should be paid to the bankrupt estate as a one-half owner, and that the other half was to be paid to Mr. Kuntz individually, after subtracting from that half the sum of $53,000, which the court ordered to be paid to the First National Bank of Dayton, Ohio, which held a judgment lien on the property arising out of a previous unrelated suit brought by the bank against Mr. Kuntz. The bond posted by the City was, of course, allowed to be released. (TS, pp. 18-19).

Because Mr. Kuntz repeatedly refused to honor his prior agreement to pay counsel directly and seek reimbursement from the trustee, appellee made an application for allowance of attorney fees in its own name to the Bankruptcy Court. In this application, counsel requested reimbursement of one-half of the amount of attorney fees incurred during the litigation. The $20,000 which had been received by appellee from Mr. Kuntz was credited to Mr. Kuntz's portion of the fees due, since that money did not come from the trustee. (TS, pp. 9, 53, 56-57).

Mr. Kuntz appeared at the hearing before the Bankruptcy Court and questioned Mr. Manley with respect to his testimony. The trustee was also present and also questioned Mr. Manley.

Upon review of the application, the court reduced the amount sought in certain respects as indicated in the order

of the court, and directed the trustee to pay to appellee the sum of $47,689.47. (See also TS, pp. 58-61; the court's opinion from the bench.) This Entry was dated May 15, 1989. From this Entry, the appellant filed a Notice of Appeal dated June 7, 1989. A motion of the appellee to dismiss the appeal was filed on September 27, 1989. On June 7, 1990, the District Court denied the motion to dismiss the appeal and affirmed the ruling of the Bankruptcy Court with respect to the allowance of fees. From that ruling, Mr. Kuntz has appealed the judgment of the District Court.

IV. STATEMENT OF THE STANDARD OF REVIEW

Both the Bankruptcy Court and the District Court have wide discretion in the allowance of fees. *Matter of Pontiac Hotel Ass.*, 92 BR 715 (ED Mich. 1988). *In Re Wonder Corp. of America*, 82 BR 186 (D.Conn. 1988); *In Re National Paragon Corp.*, 87 BR 11 (ED Pa. 1988); *Cont. Ill. Nat. Bank & Trust Co. of Chicago v. Wooten*, 90 BR 226 (WD La. 1988).

Thus, the standard of review is whether the Bankruptcy Court abused its discretion in reviewing the fee application, reducing it in several respects, and awarding the fee amount pursuant to the Court's prior order authorizing the retention of special counsel as well as the contractual agreement between appellant and appellee.

V. ARGUMENT

The appellant sets out two reasons why he believes the order of the Bankruptcy Court should be modified on appeal. First, he suggests that the Court or counsel or both failed to properly account for the $20,000 he paid to Manley, Burke & Fischer during the early stages of the litigation. Secondly, he suggests that the only legal work which benefited the estate was the (relatively) brief time spent in

court during the valuation trial itself. Neither of these reasons is supported by law, and most of them are not even based upon the undisputed facts which were before the Bankruptcy Court.

The appellant has failed to show, as he must in order to prevail, that the court below abused its discretion in affirming the award made by the Bankruptcy Court. Likewise, he has failed to show, as he must in order to prevail, that any findings made are clearly erroneous. The appeal is simply without merit. The various reasons raised by the appellant can be discussed separately.

1. *The actions of counsel did benefit the estate.*

The appellant suggests that the court below should have reduced the award to approximately $12,000 (p. 7 of Appellant's Brief) on the grounds that the only benefit to the estate was obtained from the one and one-half days actually spent in the valuation hearing tried to the Court of Common Pleas of Montgomery County, Ohio. No reference is made by appellant to the complexity of the case, to the trial preparation (in which he assisted to a great extent and is thus aware of), to the location, retention and preparation of expert witnesses, nor does appellant acknowledge the fact that counsel was retained specifically to challenge the right of the City of Dayton to take the property in question, to appeal that question all the way to the United States Supreme Court, and, if all else failed, to obtain the highest value possible for the property. The appellant agreed to pay counsel for time and expenses incurred in this litigation, all of which was approved by the appellant and by the Bankruptcy Court prior to the provision of any legal services by the appellee.

If the goal of the process was to obtain the highest jury verdict possible, then (1) there would have been no subsequent appeals; (2) the fee agreement would have probably been contingent rather than hourly; (3) the challenge to the

right to take (a week-long trial) would have been unnecessary; and (4) the case would probably have settled. As it turned out, the jury verdict was far in excess of the City's valuation and represented an enormous benefit for the owners. In ruling on the fee application, the Bankruptcy Court noted the reasonableness of the fees, the complexity of the case and specifically found: "There has been reflected a definite benefit to the estate." (TS, p. 62). The District Court affirmed on the ground that the record indicated that all of the work for which compensation was sought was authorized by Mr. Kuntz and did in fact benefit the estate.

Success on every issue is not necessary for compensation. *In Re Sinor,* 87 B.R. 620 (E.D. Cal., 1988). The entirety of the litigation was a benefit to the estate, as evidenced by the astounding disparity between the jury award on valuation and the prior offer of the City. A full allowance for fees is permissible under the benefit to the estate doctrine where all legal services furthered the end result of the very sale which produced a return for the creditors. *In Re Loop Hosp. Partnership,* 50 B.R. 565 (Ill. 1985). The absence of a monetary benefit from every particular aspect of the litigation is not determinative of whether to allow compensation. *In Re H.C.S. Corp.,* 59 B.R. 307 (S.D. Cal. 1986).

There was nothing in the engagement letter which premised payment upon the success of the challenge to the right to take. Counsel was hired specifically to make that challenge, and both Mr. Kuntz and the trustee were kept aware of the status of the litigation and its costs at all stages of the case. If the standard suggested by the appellant were to become the law, it is doubtful that trustees would be able to obtain counsel to provide services to an estate.

The standard for determining the success of a valuation hearing is to compare the jury award ($235,000) to the prior settlement offer made by the City, in this case $67,000. The record also reflects that payment of a fee on a

contingency basis for the valuation hearing alone, were no challenge made to the right to take, would have been for an amount in excess of the hourly rates chargeable to that part of the case. The Bankruptcy Court's finding that the litigation constituted a 'definite benefit' to the estate (TS, p. 62) is supported by the record, is not clearly erroneous, and should be affirmed.

2. *Previous cash payments by appellant were properly credited to his account.*

The appellant suggests that the $20,000 in attorney fees paid by him prior to July of 1987 should have been credited to the account of the bankrupt corporation. These funds, however, were paid to appellee by Mr. Kuntz, not by the trustee (TS, pp. 9, 53, 56); the order of the Bankruptcy Court dated May 5, 1989, was the only authorization to the trustee to pay appellee any attorney fees.

Accordingly, it would have been improper for appellee to credit such an amount to the account of the debtor estate without approval, as noted by the District Court. Furthermore, the payment by Mr. Kuntz was in accordance with his original agreement to pay all fees as they became due and to seek reimbursement from the bankrupt estate at a later date. (TS, p. 8). For these reasons, the record clearly indicates that proper credit was given to Mr. Kuntz by appellee for the $20,000 paid prior to the application. Collection of compensation from him for the other one-half of the amount due took that payment into account in the proceedings in the Court of Common Pleas in Ohio subsequent to the hearing appealed from. (TS, pp. 53, 56-57).

The District Court affirmed the decision of the Bankruptcy Court to allow compensation for the preparation of the fee application by adopting the reasoning of the 9th and 5th Circuits, and others, specifically noting reliance upon *In Re Nucorp Energy, Inc.*, 764 F.2d 655 (9th Cir. 1985),

generally regarded as the leading case on this question, even though it adopted the prior reasoning of the Fifth Circuit in *Rose Pass Mines, Inc. v. Howard,* 615 F.2d 1088 (5th Cir. 1980).

Although the District Court noted that some Bankruptcy Court decisions have rejected this reasoning and that the Third Circuit has not specifically adopted it, there are no Circuit Court decisions rejecting it.

3. *The Bankruptcy Court properly allowed counsel compensation for the time expended in the preparation of the fee application.*

The appellant suggests that the time expended by counsel in preparing the fee application should be disallowed as doing "little or nothing to benefit the debtor." (Appellant's Brief, p. 7.) First of all, "it is now well settled that professionals are entitled to reasonable fees in preparing their application for compensation . . ." *In Re Sinor,* 87 B.R. 620 (E.D. Cal. 1988). The Bankruptcy Court specifically stated in its ruling that there is ample authority for the allowance of compensation for the preparation of a fee application (TS, p. 59), which is especially true where fees are unavailable unless such a fee application is submitted. A few of the authorities for this ruling include:

Nunley v. Jessee, 92 B.R. 152 (W.D. Va. 1988).

Matter of Pontiac Hotel Associates, 92 B.R. 715 (E.D. Mich. 1988).

In Re Chicago Lutheran Hosp. Assn., 89 B.R. 719 (N.D. Ill. 1988).

In Re Nucorp Energy, 764 F.2d 655 (9th Cir. 1985).

In Re V.A. & L.C. Brown Co., Inc., 75 B.R. 539 (E.D. Pa. 1987).

In Re W.G.S.C. Enterprises, Inc., 47 B.R. 53 (B.K. Ga. 1985).

In Re Pettibone Corp., 74 B.R. 293 (N.D. Ill. 1987).

In Re Wildman, 72 B.R. 700 (N.D. Ill. 1987).

In Re Thacker, 48 B.R. 161 (B.K. Ill. 1985).

In Re Seneca Oil Co., 65 B.R. 902 (W.D. Ok 1986).

In addition, this is a particularly inappropriate case for consideration of this issue due to the fact that the record shows that the time spent by counsel in preparing the fee application should have been unnecessary because Mr. Kuntz originally agreed to pay appellee the entire amount due, and then to seek reimbursement himself from the trustee after the litigation had produced a sum of money from which payment could be made. (TS, pp. 8, 32-33). Thus, Mr. Kuntz originally agreed to assume the obligation (and the risk of reduction) involved in the fee application. It is disingenuous of him at this time to suggest that, under these circumstances, the costs of preparing the fee application should be disallowed.

Upon this record, it was hardly an abuse of discretion by either the Bankruptcy Court or the District Court to follow the authority cited above and allow compensation for the fee application made in this case. For these reasons, the judgment of the District Court should be affirmed.

VI. CONCLUSION

The Bankruptcy Court reviewed the voluminous documentation submitted in support of the fee application, reviewed the affidavit of counsel and heard testimony from appellee in support of the application for fees. The appellant himself attended the hearing, questioned Mr. Manley upon cross examination, as did the trustee. Upon consideration of all of the evidence presented, the Bankruptcy Court reduced the amount of the application by an amount in excess of $7,000 (approximately 14%). (For example,

reduction of travel time to 50% of the usual hourly rate is supported by prior authority: *In Re S.T.N. Ent., Inc.*, 70 B.R. 823 (Bk.D.Vt 1987).) The District Court affirmed this ruling. Appellant has shown no abuse of discretion, nor any reason in law why the actions of the Bankruptcy Court or of the District Court were in error.

For these reasons, the decision of the District Court affirming the decision of the Bankruptcy Court allowing compensation to counsel for the trustee should be affirmed.

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Telephone: (513) 721-5525

OF COUNSEL:
Manley, Burke & Fischer
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Cincinnati, Ohio 45202

CERTIFICATE OF ADMISSION

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit as of September 6, 1990.

TIMOTHY A. FISCHER

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellee Manley, Burke & Fischer is being mailed to all parties entitled to service under Rule 8, Federal Rules of Appellate Procedure, on the 20 day of September, 1990.

TIMOTHY A. FISCHER

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8347H/kjh

Appendix I—Extract From a Transcript Before the United States Bankruptcy Court.

IN THE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE:

ONE WESTMINISTER CO., INC.,

Debtor

Chapter 11 No. 83-14

BEFORE: THE HONORABLE HELEN S. BALICK

HEARING ON FEE APPLICATION FOR TRUSTEE AND WITHDRAWAL OF TRUSTEE.

July 5, 1989
11:00 o'clock, a.m.

The Court: Mr. Walsh.

Mr. Walsh: Thank you, Your Honor.

This is in the One Westminister case, the time set by the court to hear two applications which I have filed as trustee in the case, one application seeking authorization to withdraw, the other application seeking compensation for myself, as trustee, and my firm, as counsel to the trustee, for services rendered and costs advanced in this case.

I assume that with Your Honor's usual practice, you read the motion, so I'll be brief.

This case is six-and-a-half years old. There hasn't been much activity in this court, but there's been a lot of activity in Ohio.

The court may recall that about a month ago, we had a two- or three-hour—probably a two-hour hearing on Mr. Manley's fee application. And at that time, I think we fairly well reviewed how this case got to where it is.

And at that time, I indicated that, as far as I was concerned, my reason for being in the case was no longer there and I would file an application. I indicated that on the record. Mr. Kuntz indicated he agreed with that approach and this is where we are.

The fee application indicates that there's billable time in this case of approximately $9,600. My fee request is $7,500.

The reason that I have cut that is very simple. There's nothing unusual in terms of professional services that I provided in this case.

Quite frankly, most of my time in this case was involved in either counseling or listening to or hearing from Mr. Kuntz.

And as we know, he is a very prodigious letter writer and communicator, motion movement applicant, et cetera. And he generated a lot of activity in this case, and presumably will in the future, but hopefully without me.

In the application on the motion to withdraw, I have indicated that there is remaining in an interest-bearing account at this time approximately $132,000.

Now, subsequent to the filing of this application, I paid the Manley, Burke and Fisher fee of $47,689.47. That was paid pursuant to the court's May 15th order.

There has been an appeal taken by Mr. Kuntz from that order; however, no application was made to stay the order,

so that pursuant to Rule 8005, the order became final and I delivered a check to Manley, Burke and Fisher.

Manley, Burke and Fisher wrote to me requesting that I do that in view of the fact that the order had not been stayed. I thought that was entirely proper and I paid that bill.

Manley, Burke and Fisher wrote to me and indicated that should the unlikely thing happen on appeal, that is, the order is reversed or in some way modified to reduce their fee, they represented that they are—and I believe they are—a financially responsible firm and they have committed to refund to the estate any reduction in the fee should that result from the appeal. Under the circumstances, I thought it appropriate to pay that fee at this time.

There is now remaining in the estate account, $85,011.97. Those calculations are based upon a March 31, 1989 balance. So it's probably—the number is probably a little

* * *

Appendix J—Objections and or Observations to the Application for Fee's, Expenses and Other Compensations of Special Counsel to the Trustee and Debtor-Manley, Burke & Fisher.

IN THE

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: ONE WESTMINISTER CO., INC.

Debtor

Case 83-14 CH 11 (HSB)

Now comes William Kuntz, III appearing *pro se* and as a creditor, party in interest and former D.I.P makes the following observations and objections to the application submitted by S.V. 'Abramo, Esq. on behalf of the special counsel not set for hearing May 8, 1989.

1. The application for compensation contains interest on the account prior to court approval. Accordingly such interest should be disallowed.

2. The application for compensation contains considerable billings for the preparation of the application for fee's. Included in such billings were numerous intra office conference time billed. Such compensation should be excluded from consideration in the fee application.

3. The application for compensation contains a considerable amount of travel time at the full billable amount. Such travel being conducted between Dayton and Cincinnati, Ohio. These amounts should be reduced in accordance with other Bankruptcy Case Law.

OCTOBER 1988

4. The application as submitted seeks some $765.00 in billing on 10/12 & 13/88 plus $592.25 undocumented travel expense for a trip to Washington. DC to file court papers. Said court papers did not conform to the rules of the court and accordingly were subject to revision. Accordingly said billing and expense should be disallowed.

OCTOBER 1988

5. The application provides for an additional billings of some $3,000.00 to correct prior "error's" for which compensation is already being sought in the amount of some $6,500.00 said additonal billing should be disallowed. The second billing accordingly raises the question of the adequacy of the first billing.

6. The application contains subapplications for professional services to the hearing on the challenge of the right of the City of Dayton to exercise the power of eminent domain. Neither professional had prior court approval in accordance with the practice in this district and further the family of the attorney who testified Mr. Donenfeld had a financial interest in property in the arcade square project. The application does not contain any indication as to whether these are reimbursements or supplemental applications.—2/1/89.

7. During the pendancy of the appeal the funds awarded earned only some $12,740 in interest. This would represent a short-fall of some $26,000 in interest that could have been earned if the funds had been invested at market rates. Therefore any fee award should be reduced by that amount.

8. The application contains an amount of 7,844.33 in a statement dated 10 Feb. 89 which appears to be undocumented amounts of some nature and accordingly should be disallowed.

9. The fee application contains numerous hours spent on the telephone. There is no supporting detail with regards to telephone charges supporting said billings according such hours should be disallowed.

10. The fee application contains numerous hours speaking with Mrs. Carlson of the First National Bank of Dayton, Ohio. Nothing in the fee application indicates as to what if any benefit to the estate accrued, accordingly all such billing should be disallowed.

11. In billings from 8/26/86 thru 9/26/86 there is no amount of time allocated to the billings in the amount of some $3,800.00. Said hours should be either documented or disallowed.

12. The application indicated a pre-payment advance of $20,000. Such a payment together with an allowance for interest earned prior to the fee award should be applied to any fee award reducing the net amount.

13. The application contains a number of multiple hours for intra-office billed hours spent in conference. This is over & above those hours billed for the fee application. Such

billings should be approved only consistent with the approved Bankruptcy Law on such matters.

GENERAL OBSERVATIONS AND OR OBJECTIONS

In an overview of the fee application of special counsel to the trustee, the matters litigated in Ohio are in two branch.

A. The right of the City of Dayton, Ohio to exercise eminent domain. This consisted of two civil right counter-claim which were dismissed, an answer to the complaint, two civil right actions which were dismissed on motion of special counsel, a three day trial before a visiting judge, an appeal to the Court of Appeals, a motion to the Supreme Court of Ohio to certify the record and a petition of certiorari filed with the Supreme Court of the United States.

B. A jury trial on valuation which took 1 1/2 days.

It is the understanding of objectant that the test of fee awards is now contained in the case *Johnson -vs- Georgia Highway Express, Inc.* 488 F.2d 714, which sets out a 12-part test for the court to apply.

In addition, the test applied to fee awards in bankruptcy cases is what benefit did accrue to the estate and based upon what hours where expended on that effort. The bulk of the fee application before the court deals with Branch A of the fee application. It would appear that only those hours rendered from April, May and June 1987 are actually those hours which rendered any benefit to the estate a total of some $10,000.

As Branch A of the fee application did not benefit the estate by any measure it should be disallowed.

Respectfully submitted,

WILLIAM KUNTZ, III
11 N Pearl St
Albany, NY 12207 18006347040

Appendix K—Order of United States Bankruptcy Court, July 18, 1983.

UNITED STATES BANKRUPTCY COURT
DISTRICT DELAWARE

HUGH M. LEONARD
UNITED STATES TRUSEEE FOR THE
DISTRICT OF DE. & N.J.
1180 Raymond Blvd., Rm. 2549
Newark, New Jersey 07102
(201) 645-2617

In the Matter of:

ONE WESTMINISTER COMPANY, INC., A
Corporation of the State of Delaware

Debtor.

Chapter 11
Case No. 83-14

ORDER FINDING FIRST NATIONAL BANK
DAYTON, OHIO IN CONTEMPT

This matter having been brought on before the Court upon the application of HUGH M. LEONARD, UNITED STATES TRUSTEE seek an Order holding the First National Bank of Dayton, Ohio, in contempt for proceeding with a foreclosure sale on the certain property located at 44 West Third Street, Dayton, Ohio thereby violating the auto-

matic stay provisions of the United States Bankruptcy Code, said Motion being returnable on July 7, 1983, and with Ray A. Cox, Esq., appearing for First National Bank of Dayton Ohio and Gregory J. Cuzzolino, Esq., Staff Counsel, appearing for Hugh M. Leonard, United States Trustee and Samuel V. Abramo, Esq., for One Westminister Co., Inc., debtor-in possession, and the Court having considered the Application in support thereof, and for good cause shown:

It is on this 18th day of July 1983

ORDERED, that the First National Bank of Dayton Ohio is adjudged and hereby found to be in Contempt of Court for violating the automatic stay provisions of the United States Bankruptcy Code.

FURTHER ORDERED, that the automatic stay provisions of the United States Bankruptcy Code are to be effective in all respects and specifically with respect to the premises commonly known as 44 West Third Street, Dayton, Ohio.

HELEN S. BALICK
BANKRUPTCY JUDGE

CERTIFIED:
AS A TRUE COPY
ATTEST:
CAROLYN C. Illegible, CLERK
U.S. BANKRUPTCY COURT

BY Joyce L. Winnen 7/18/83
Deputy Clerk

Appendix L—Order of U.S. District Court for the District of Delaware, Dated May 14, 1986.

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

IN RE: ONE WESTMINISTER CO., INC.,

Debtor.

Civil Action No. 85-683 MMS.

ORDER

At Wilmington this 14th day of May, it appearing that:

1. On October 2, 1985, the United States Bankruptcy Court for the District of Delaware granted the Motion of the United States of America for Dismissal of the Chapter 11 case. In the Matter of One Westminister Co., Inc., Bankruptcy No. 83-14.

2. On October 11, 1985, William Kuntz, III, a creditor and party in interest, filed a Notice of Appeal of the Bankruptcy Court's Dismissal in the United States District Court for the District of Delaware.

3. On October 24, 1985, William Kuntz, III filed a Designation of Issues on Appeal reciting the following:

a. That on moving for conversion or dismissal, the U.S. Attorney must provide timely and proper notice to the trustee and counsel for the trustee.

b. That the U.S. Attorney's Office should review the record of the case prior to the filing of a dismissal motion.

c. That the U.S. Attorney may not move for dismissal on behalf of the Commissioner of the IRS when there is evidence of misconduct on the part of a national bank in violation of federal law.

d. That the notice provided by the U.S. Attorney was in-effective and not sufficient to provide due process by proper notice.

e. That the U.S. Attorney may not move for dismissal when there is evidence of violation of 18 U.S.C. SS 1961 *et seq.*

f. That the court abused its discretion in granting the motion of the IRS brought by the U.S. Attorney.

4. The United States of America in filing and noticing its Motion for Dismissal or Conversion failed to conform to the requirements of Rule 9013 of the Rules and Forms of Practice and Procedure in Bankruptcy, in that it did not serve the Chapter 11 trustee with the Motion.

IT BEING APPARENT from the above that the matter should be remanded to the United States Bankruptcy Court for the District of Delaware for further proceedings under Chapter 11, including reconsideration of any Motion for Dismissal or Conversion refiled and properly noticed by the United States of America.

IT IS ORDERED that the matter is remanded to the United States Bankruptcy Court.

Murry M. Schwartz, United States
District Judge.

6-16,23,30: 7-7

Appendix M—Order of the U.S. District Court for the District of Delaware, Dated May 23, 1990.

IN THE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: ONE WESTMINISTER COMPANY, INC.

CIVIL ACTION NO. 89-480 LON

ORDER

This case was stayed pursuant to an agreement between the parties on August 6, 1990, pending the outcome of proceedings in an action filed in the Third Circuit. Whether or not future action will be necessary in this action is now unpredictable and there appears no reason to carry this action for statistical purposes as an open case.

NOW, THEREFORE, IT IS ORDERED that:

1. By agreement of the parties, further proceedings in this case are stayed pending the disposition of the Debtor in Possession's appeal in the Third Circuit of Judge Roth's May 15, 1989, Order.

2. The Clerk shall remove this action for statistical purposes as an open case.

3. Noth[illegible], contained in this order shall be considered a dismissal or disposition of this matter and, should further proceedings become necessary or desirable, any party may initiate it in the same manner as if this order had not been entered.

8/23/90

Joseph J. Longobardi, D.J.

Supreme Court, U.S.
FILED
APR 19 1991
OFFICE OF THE CLERK

(2)

90-1475

No.

IN THE

SUPREME COURT OF THE UNITED STATES

1990 TERM

WILLIAM KUNTZ, III, et al.

Petitioner,

against

MANLEY, BURKE & FISCHER, et al.

Respondents.

MEMORANDUM OF RESPONDENT MANLEY, BURKE & FISCHER IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Timothy A. Fischer, Esq.
Attorney for Respondent
Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

I. ARGUMENT

There is no federal statutory or constitutional issue of any kind presented by this petition. Manley, Burke & Fischer (a corporation having no parent or subsidiary or affiliated companies) was retained by both of the joint owners of real estate as counsel to defend an eminent domain proceeding brought by the City of Dayton, Ohio. One joint owner was One Westminister, Inc., a corporation then in bankruptcy in Delaware (the petitioner was the sole owner of that corporation and was its largest creditor); the other joint owner was the petitioner, an individual resident of New York; there was a written contract with the trustee, and the representation was approved in advance by the Bankruptcy Court.

After the litigation, Manley, Burke & Fischer, pursuant to its written agreement, requested payment of its bill, 50% from the corporation in bankruptcy and 50% from the individual petitioner. The issues presented to the Courts below concern only the application for 50% of the total fees submitted to the Bankruptcy Court.

Upon written application to the Bankruptcy Court, and after a hearing, at which the petitioner appeared, questioned one witness, but made no argument in opposition to the application, the court allowed approximately $47,000 to be paid by the trustee. Upon appeals taken by the petitioner herein, that ruling was affirmed by the District Court and was again affirmed by the Third Circuit.

A different application was made to the Court of Common Pleas for

payment of the other 50% of the fees due, which application is not involved in this case.

With respect to the First Question Presented, whether the Bankruptcy Court was correct in awarding compensation to counsel for the time spent in preparing the fee application, that Question cannot be raised here because the Petitioner failed to present the issue to the Third Circuit, which accordingly made no ruling on that issue:

> "We intimate no view as to the correctness of Judge Roth's conclusion that counsel is entitled to compensation for the time expended in preparing fee applications in bankruptcy cases, a question we have not decided, since it is not squarely before us on appeal." (Judgment Order, U.S. Court of Appeals, Appendix A, p. 2a, n.1, Appendix to Petition.)

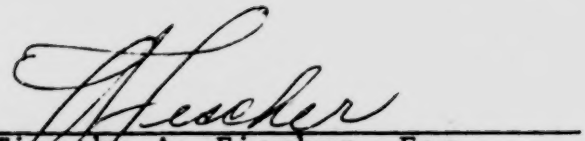
Even if the issue were raised and decided by the Third Circuit, this case would be particularly inappropriate for review since the underlying agreement to employ counsel provided that petitioner personally was to advance the fees to counsel and then he would seek reimbursement from the Bankruptcy Court, thus relieving counsel of the obligation to prepare a fee application.

Thus, petitioner himself assumed the obligation (and the risk of reduction) involved in the fee application process. It is disingenuous of him at this time to suggest that, under these circumstances, the costs of preparing the fee application should be disallowed. These facts were fully presented to the Bankruptcy Court and the District Court, which considered

them and made a ruling in accordance with well established authority. (See Appendix B, pp. 3-b-4-b, 12b, Opinion of District Court, and Appendix H, pp. 14-h-15-h, Appendix to Petition).

In petitioner's Second, Third and Fourth Questions presented, he is asking this court to review the weight of evidence which formed the basis for the amount of fees awarded. Not only is that an inappropriate task for this Court, those questions have been fully reviewed twice already, and the unanimous written decisions find no abuse of discretion or legal error. These issues raise no substantial federal statutory or constitutional questions.

Accordingly, respondent respectfully requests that the petition for writ of certiorari be denied.



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Telephone: (513) 721-5525

OF COUNSEL:

Manley, Burke & Fischer
225 West Court Street
Cincinnati, Ohio 45202

ACKNOWLEDGEMENT OF SERVICE

I hereby certify that the foregoing Memorandum of Respondent Manley, Burke & Fischer in Opposition to the Petition for Writ of Certiorari is being mailed to Petitioner, William Kuntz III, Box 1722, Broadway Station, Albany, New York 11201, on the 19 day of April, 1991. All parties required to be served have been served, as indicated above.

Timothy A. Fischer

3203I/kjh